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MISCELLANEOUS REPERTORY.

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BY JOHN E. HALL, ESQ.
OF BALTIMORE.

VOL. II.

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American Law Journal

AND

MISCELLANEOUS REPERTORY.

BY JOHN E. HALL, ESQ.
OF BALTIMORE.

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Law Journal and Miscellany.

No. I.

AMERICAN STATE PAPER,

[Concluded.]

Documents accompanying the Message from the President of the United States at the commencement of the Second Session of the Tenth Congress. November 8, 1808.

Extracts and Copies of Letters from Mr. Madison to Mr. Pinkney.

Extracts of a Letter from Mr. Madison, Secretary of State, to Mr. Pinkney, Minister of the United States at London, dated

Department of State, December 23, 1807.

MR. ERSKINE having been so good as to let me know that the mail of this evening will carry his despatches for a *British* packet, which will sail from *New York* immediately on their arrival there, and other conveyances now failing, I avail myself of the opportunity, to inclose you a copy of a message from the president to congress, and their act in pursuance of it, laying an immediate embargo on our vessels and exports. The policy and the causes of the measure are explained in the message itself. But it may be proper to authorize you to assure the *British* government, as has been just expressed to its minister here, that the act is a measure of precaution only, called for by the occasion; that it is to be considered as neither hostile in its character, nor as justifying, or inviting or leading to hostility with any nation whatever, and particularly as oppo-

sing no obstacle whatever to amicable negotiations and satisfactory adjustments with *Great Britain*, on the subjects of difference between the two countries.

The suddenness of the present opportunity does not allow me time to add more than a newspaper, containg a part of the proceedings of congress in relation to the embargo.

P. S. As you may be able to find conveyances to *Paris*, whither none will for some time offer hence, I request the favour of you to communicate to general *Armstrong* the contents of this letter, and through him, or otherwise, to Mr. *Erving* at *Madrid*.

Extract from the same to the same, dated

Department of State, February 19, 1808.

" A vessel having been engaged to carry from the port of *New York* public despatches and mercantile letters to *Europe*, I avail myself of the opportunity of forwarding you a series of gazettes, which contain the proceedings of congress, and such current information as will give you a view of our internal affairs. They will be put, with this letter, into the hands of Mr. *Nourse*, a passenger in the despatch vessel, who will deliver them at *London;* and as the vessel which will have previously touched at *L'Orient*, will, after waiting ten or twelve days at *Falmouth*, return to that port, and thence to the *United States*, you will have an opportunity of sending thither any communications you may wish to make to *Paris*, as well as of transmitting to your government such as may follow up your correspondence, which, at the present period, will be the more acceptable, the more it be frequent and full.

" My last, which was committed to the *British* packet, inclosed a copy of the act of embargo, and explained the policy of the measure. Among the considerations which enforced it, was the probability of such decrees as were issued by the *British* government on the 11th of *November;* the language of the *British* gazettes, with other indications, having left little doubt that such were meditated. The appearance of these decrees has had much effect in reconciling all descriptions

among us to the embargo, and in fixing in the friends of the measure their attachment to its provident guardianship of our maritime interests.

Mr. *Erskine* communicated, a few days ago, the several late decrees of his government, with expressions of the regret felt by his *Britannic* majesty at the necessity imposed on him for such an interference with neutral commerce, and assurances that his majesty would readily follow the example, in case the *Berlin* decree should be rescinded, or would proceed, pari passu, with *France*, in relaxing the rigour of their measures. Mr. *Erskine* was asked, whether his government distinguished between the operation of the *French* decree, municipally on land, and its operation on the high seas. On this point he was unable to answer; as he also was to an inquiry, whether the late *British* decrees had reference to the late extension of the *French* decree with respect to the *United States*. He seemed also, as is perhaps the case with his government, to have taken very little into consideration the violations of neutral commerce, and through them the vast injury to *France* antecedent to the *Berlin* decree. It is probable that something further is to pass between us on this subject."

Extract of a Letter from the same to the same.

Department of State, March 8, 1808.

"Having just learnt that the present mail will arrive at *New York* in time for the *British* packet, I avail myself of the opportunity of forwarding your commission and letters of credence, as successor to Mr. *Munroe*, in the legation at *London*.

Since my last, which went by Mr. *Nourse* in a despatch vessel, bound first to *L'Orient*, and then to *Falmouth*, I have received your communication of the 23d *November* and — of *December*. These, with a representation from general *Armstrong* to the *French* government, on the subject of the decree of *Berlin*, as expounded and enforced in the case of the ship *Horizon*, were thought by the president to throw so much

light on the course likely to be pursued by *Great Britain* and *France*, in relation to the *United States*, that he had the documents confidentially laid before congress.

Mr. *Erskine* has made a written communication on the subject of the *British* orders. I shall answer him as soon as the very urgent business on hand will permit."

Extract of a Letter from the same to the same, dated

Department of State, March 22, 1808.

" My last bears date the 8th instant, and went by the *British* packet. It acknowledged your letter of *November* 23d, and of — *December*. I have since received those referred to in the letter, and also that of *January* 26, which came to hand last evening.

I cannot inclose my answer to Mr. *Erskine's* communication of the *British* orders; the unceasing pressure of other matters, on a state of health still feeble, having thus far delayed it. You will anticipate the complexion which will necessarily be given to it by the character of measures, not only violating our rights, and stabbing our interests; but superadding under the name of indulgences, a blow at our national independence, and a mockery of our understandings."

Mr. Madison to Mr. Pinkney.

Department of State, April 4, 1808.

SIR,

My last was of *March* 22, and went under the care of Mr. *Rose*. I now forward printed copies of the correspondence with him on the subject of his mission, and of the antecedent documents relating to the case of the *Chesapeake*. As soon as the voluminous residue of the communications made to congress issues from the press, it shall also be forwarded. You will find that they include certain documents relating to *France*, which were thought proper for the knowledge of congress at the present crisis.

To these communications I add copies of Mr. *Erskine's* letter to me on the subject of the *British* decrees of *November* last, and of my answer. And that you may have a view of the ground which has been taken with respect to the *French* decree of *November*, 1806, and to the judicial exposition in the case of the *Horizon*, giving to it an illegal operation against the *United States*, I inclose copies of two letters to general *Armstrong* on those subjects.

The president made to congress, a few days ago, other communications relating to the present crisis with *Great Britain* and *France*, among which were Mr. *Erskine's* letter, now inclosed, and a letter from M. *Champagny* to general *Armstrong* explaining the course meditated by the *French* government with respect to the commerce of the *United States*. These being excepted from the confidential character attached to the others have been published, and will be found among the printed inclosures. Your letter of *February* 26th was included in the communications to congress, but not in the exception.

The conduct of the two great contending nations towards this country, as it will now appear to it and to the world, fully displays their mutual efforts to draw the *United States* into a war with their adversary. The efforts on both sides are too little disguised to be worthy the discernment of either, and are addressed moreover to motives which prove great ignorance of the character of the *United States*, and indeed of human nature.

From the posture in which Mr. *Rose's* final reply to the compromise proposed to him placed the question of adjustment in the case of the *Chesapeake*, it remains with the *British* government to resume it, if adjustment be their object. Whether a tender of reparation will be made here, or to you, will also lie on that side. It will certainly be most becoming that government, under all circumstances, to make the reparation here; and this course might of right be insisted on by this government. The president, nevertheless, in the liberal spirit which always governs him, authorizes you to accept the reparation, provided it be tendered spontaneously, be charged

with no condition, unless it be that, on the receipt of the act of reparation here, the proclamation of *July* 2d shall be revoked: and provided the reparation shall add, to the disavowal of the attack on the *Chesapeake*, an express engagement that the seamen retained shall be immediately restored, and that the guilty officer experience an exemplary punishment. The reparation will be the more satisfactory, and not exceed a just expectation, if the restoration of the seamen be made to the very ship from which they were wrested, and if provision be made for the wounded survivors, and for the families of those who lost their lives by the attack.

I must repeat, however, that it is considered entirely proper, that the reparation should be offered here, rather than in *London*, and it is only in the event of a decided repugnance in the *British* government to make it through a functionary here, that you are to accept it there.

The answer to Mr. *Erskine's* letter on the *British* orders, will furnish the grounds to be taken in your communications with his government on that subject. If the cabinet can be brought to view the orders in their true light, a revocation of the whole of them cannot fail to take place, unless they mean to violate every maxim of justice, or are fixed in hostile purposes against the *United States*. In not regarding the orders, indeed, as acts of hostility, and in trusting for redress to the motives and the means, to which they have appealed, the *United States* have given the most signal proof of their love of peace and of their desire to avoid an interruption of it with the *British* nation.

Still it is to be understood, that whilst the insult offered in the attack on the *American* frigate remains unexpiated, you are not to pledge, or commit your government, to consider a recal of the orders as a ground on which a removal of the existing restrictions on the commerce of the *United States* with *Great Britain* may be justly expected.

The two letters to general *Armstrong*, of the 22d *May*, 1807, and *February* 8th, 1808, are poofs of the sincerity and impartiality with which the president has proceeded in relation

to the belligerent parties, and may, perhaps assist you in repressing unjust suspicions, imbibed by the *British* cabinet. It would be happy for all parties, the belligerents as well as the *United States*, if truth could, in this case, be made to prevail; and if the retaliating rivalship of the former against the latter, could be converted into an emulation, as politic, as it would be magnanimous in both, to take the lead in a fair, lawful and conciliatory course, towards a nation which has done no wrong to either. Should the experiment be made on either side, it would probably be followed on the other; and it could never happen, that the side first doing justice would suffer on that account.

In the present state of our relations to *Great Britain*, it would be premature to mark out the course to be pursued with respect to further negotiations on other topics than those above noticed. You are authorized, however, to continue your interpositions in behalf of our impressed or *detained* seamen; and in the event of a repeal of the *British* orders, and of satisfactory pledges for repairing the aggression on the *Chesapeake*, to enter into formal arrangements for abolishing impressments altogether, and mutually discontinuing to receive the seamen of each other, into either military or merchant service, conformably to the instructions on this point transmitted by Mr. *Purviance*.

You will find by a passage in Mr. *Rose's* reply of *March* 17th, that the *British* government does not maintain the principle, that the obligation of the *United States* extends beyond the discharge of deserters from their public service: and by an order of the navy department here, already carried into execution, of which a copy is inclosed, that it has lately been decided that no foreign seamen, whether deserters or not, shall serve on board our ships of war. The principles, respectively manifested by these documents, ought to facilitate such an adjustment as is contended for by the *United States*.

I have the honour to be, &c.

(Signed) JAMES MADISON.

William Pinkney, esq. Minister Plenipotentiary
United States—London.

Extract of a Letter from the same to the same, dated

Department of State, April 30, 1808.

"My last was of the 4th instant, and went by a *British* packet from *New York*. I now forward a copy of it.

"Congress ended their session on the night of the 25th instant. The series of newspapers, herewith sent, affords a view of their proceedings subsequent to the communications last made to you. Some other prints are included which throw light on the workings of public opinion and the state of public affairs.

You will find that the critical posture of our foreign relations has produced provisions of different kinds for our greater security; and particularly that no pains have been spared to stop every leak by which the effect of the embargo laws might be diminished. I refer you also to the report made to the senate by a committee on the documents relating to the affair of the *Chesapeake*, and on the letters of M. *Champagny* and Mr. *Erskine;* and indicating the spirit which may be expected to influence the future policy of this country, if kept under the excitement resulting from the system now pursued against it.

You will observe, at the same time, that, whilst a determination is sufficiently evinced against a dishonourable acquiescence in the despotic edicts enforced on the high seas, the *United States* are ready to resume their export trade as soon as the aggressions on it shall cease; and that in a hope that this might happen during the recess of congress, the president is authorized, in such an event, to suspend, in whole or in part, the several embargo laws.

The conditions on which the authority is to be exercised appeal equally to the justice and policy of the two great belligerent powers, which are now emulating each other in a violation of both. The president counts on your endeavours to give to this appeal all the effect possible with the *British* government. General *Armstrong* will be doing the same with that of *France*. The relation in which a revocation of its unjust decrees by either, will place the *United States* to the

toher is obvious; and ought to be a motive to the measure, proportioned to the desire which has been manifested by each to produce collision between the *United States* and its adversary, and which must be equally felt by each to avoid one with itself.

Should the *French* government revoke so much of its decrees as violate our neutral rights, or give explanations and assurances having the like effect, and entitling it therefore to a removal of the embargo as it applies to *France*, it will be impossible to view a perseverance of *Great Britain* in her retaliating orders, in any other light than that of war, without even the pretext now assumed by her.

In order to entitle the *British* government to a discontinuance of the embargo, as it applies to *Great Britain*, it is evident that all its decrees, as well those of *January* 1807, as of *November* 1807, ought to be rescinded as they apply to the *United States;* and this is the rather to be looked for from the present administration, as it has so strenuously contended that the decrees of both dates were founded on the same principles, and directed to the same object.

Should the *British* government take this course you may authorize an expectation that the president will, within a reasonable time, give effect to the authority vested in him on the subject of the embargo laws.

Should the orders be rescinded in part only, it must be left to his free judgment to decide on the case. In either event, you will lose no time in transmitting the information to this department and to general *Armstrong;* and particularly in the event of such a course being taken by the *British* government, as will render a suspension of the embargo certain or probable, it will be proper for you to make the communication by a courier to general *Armstrong*, to whom a correspondent instruction will be given, and to provide a specia convevance for it hither, unless *British* arrangement shall present an opportunity, equally certain and expeditious."

Extract of a Letter from Mr. Madison to Mr. Pinkney.

Department of State, July 18th, 1808.

"Your communications by lieutenant *Lewis* were safely delivered on the evening of the 8th inst.

As it had been calculated that the interval between the return of Mr. *Rose*, and the departure of lieutenant *Lewis*, would give sufficient time to the *British* government to decide on the course required by the posture in which the affair of the *Chesapeake* was left, its silence to you on that subject could not fail to excite the particular attention of the president: and the appearance is rendered the more unfavourable by the like silence, as we learn from Mr. *Erskine*, of the despatches brought to him by the packet which left *England* and arrived at *New York* at nearly the same time with the *Osage*. I have intimated to Mr. *Erskine* the impressions made by this reserve, without, however, concealing our hope that the delay does not imply a final purpose of withholding reparation, and that the next communications from *London* will be of a different import. They must at least ascertain the real views of the *British* government on this interesting subject."

"There was certainly no just ground for Mr. *Canning* to expect any particular communications from you on the arrival of the *Osage*, unless they should have grown out of such accounts from *France* as would second our demands of justice from *Great Britain*, particularly the revocation of her orders in council: and in imparting to him what you did from that quarter, every proof of candour was given which the occasion admitted.

If Mr. *Canning* was disappointed, because he did not receive fresh complaints against the orders in council, he ought to have recollected that you had sufficiently dwelt on their offensive features, in the first instance; and that as he had chosen to make the formal communication of them to this government through another channel, it was through that channel, rather than through you, that answers to it would be most regularly given."

"The communications and instructions forwarded by Mr. *Purviance*, who was a passenger in the *St. Michael*, will enable you to bring the *British* government to a fair issue on the subject of its orders. If it has nothing more in view than it is willing to avow, it cannot refuse to concur in an arrangement, rescinding, on her part, the orders in council; and on ours, the embargo. If *France* should concur in a like arrangement, the state of things will be restored, which is the alleged object of the orders. If *France* does not concur, the orders will be better enforced by the continuance of the embargo against her, than they are by the *British* fleets and cruisers, and in the meantime, all the benefits of our trade will be thrown into the lap of *Great Britain*. It will be difficult, therefore, to conceive any motive in *Great Britain* to reject the offer which you will have made, other than the hope of inducing, on the part of *France*, a perseverance in her irritating policy towards the *United States*, and, on the part of the latter, hostile resentments against it.

If the *British* government should have elected the more wise and more worthy course, of meeting the overture of the president, in the spirit which dictated it, it is to be hoped, that measures will have been taken in concert with you, and through its minister here, for hastening, as much as possible, the renewal of the intercourse, which the orders and the embargo have suspended; and thereby smoothing the way for other salutary adjustments.

It appears that the *British* government, not satisfied with the general blockade, by her orders of *November* 11th, has superadded a particular blockade, or rather a diplomatic notification of an intended one, of *Copenhagen*, and *the other ports* in the island of *Zealand;* that is to say, a strict and legal blockade of the whole island. The island cannot be much less than two hundred miles in its outline, and is described as abounding in inlets. It is not probable, therefore, if it be possible, that the blockade, within the true definition, should be carried into effect. And as all defective blockades, whether so in the disproportion of force to the object, or in the mode of

notification, will authorize fair claims of indemnification, it is the more necessary that guarded answers should be given, in such cases, as heretofore suggested.

Since the *British* order of ——— evidently inviting our citizens to violate the laws of their country, by patronizing on the high seas their vessels destitute of registers, and other necessary papers, and therefore necessarily smugglers, if not pirates, the circular letter of Mr. *Huskisson* has made its appearance; in which the *United States* are named as alone within the purview of the order. A more extraordinary experiment is perhaps not to be found in the annals of modern transactions. It is levelled, moreover, against a nation towards which friendship is professed, as well as against a law, the justice and validity of which are not contested; and it sets the odious example, in the face of the world, directly in opposition to all the principles which the *British* government has been proclaiming to it. What becomes of the charge against the *United States* for receiving *British* subjects who leave their own country contrary to their allegiance? What would be the charge against them, if they were, by proclamation, to invite *British* subjects, those too expressly and particularly prohibited from leaving their country, to elude the prohibition? or to tempt, by interested inducements, a smuggling violation or evasion of laws, on which *Great Britain* founds so material a part of her national policy? In the midst of so many more important topics of dissatisfaction, this may not be worth a formal representation. But it will not be amiss to let that government understand the light in which the proceeding is regarded by this. I have already touched on it to Mr. *Erskine*, with an intimation that I should not omit it in my observations to you."

"The *French* decree, said to have been issued at *Bayonne*, has not yet reached this country. Such a decree, at such a time, has a serious aspect on the relations of the two countries, and will form a heavy item in our demands of redress. It is much to be regretted, at the same time, that any of our vessels, by neglecting to return home, and conforming to the arbitrary regulations of one belligerent, should expose them-

selves to the arbitrary proceedings of another. So strong and general an indignation seems particularly to prevail here against the *Americans* in *Europe*, who are trading under *British* licenses, and thereby sacrificing, as far as they can, the independence of their country, as well as frustrating the laws which were intended to guard *American* vessels and mariners from the dangers incident to foreign commerce, that their continuance in that career ought to be frowned upon, and their return home promoted in every proper manner. It appears by information from our consul at *Tangier*, that great numbers of our vessels are engaged in a trade between *Great Britain* and *Spanish* ports, under licenses from the former, and that the experiment proves as unsuccessful as it is dishonourable; the greater part of them being either arrested in port, or by *French* and *Spanish* cruisers."

Copies and extracts of Letters from Mr. Pinkney to Mr. Madison with Inclosures.

Mr. Pinkney to Mr. Madison.

London, February, 23, 1808.

SIR,

MR. CANNING has just sent me a note, of which a copy is inclosed, relative to an intended alteration, upon the subject of cotton, in their bill for carrying into execution the late orders in council. You will perceive, that he lays some stress upon the accidental observations, which (as already explained to you in my letter of the 26th of last month) were drawn from me, some time since, upon the singularly offensive project of imposing a transit duty upon our cotton. I mention to you in my letter of the 2d instant, that he appeared to have misapprehended the tendency of these observations, and that, in a subsequent conversation, he showed a disposition to remove this obnoxious feature from their plan, for the purpose of substituting an absolute interdict of the export of that article, under an idea that we should then cease to object to it;

but that I thought it my duty to decline to give him any encouragement to do so, although I agreed, as he seemed to wish it, to mention his disposition to you. A few days ago, he sent for me again, and renewed his proposal, of an immediate change, with respect to cotton, from a prohibitory duty, to a direct prohibition. My answer was the same in substance as it had been before. He then suggested the alternative arrangement, which you will see stated in his note; but, adhering to the determination I had formed, upon the first appearance of the orders in council, to make no compromise (without precise directions from my government) with the system which they announce, by becoming a party to its details, I received this proposal as I had done the other.

The *British* government, however, had resolved to adopt this last mentioned plan, whether it received my concurrence or not, upon a presumption, that it would be more acceptable to us, and perhaps, too, under the idea, that it was more defensible, than their original scheme; and the purpose of Mr. *Canning's* note, is merely to signify to me, in a manner as friendly and respectful as possible to the *United States*, their intention to propose it to parliament. One object of all this is, certainly, to conciliate us, although it may be another, to free their system, as far as they can, from the disadvantage of one of the formidable reproaches which their opponents cast upon it. But the wise and magnanimous course would be, at once to tread back their steps upon the whole of this ill judged measure, instead of relying upon small and unsubstantial modifications, which neither produce an effect upon its character and principle, nor mitigate the severity of its practical consequences. I might, if I thought it advisable, take the occasion, which Mr. *Canning's* note undoubtedly furnishes, to press upon him, once more, the policy, as well as the justice of such a course; but I believe it, under all circumstances, to be more prudent to wait for your instructions, which must, I think, be very soon received.

I have already had the honour to send you two copies of the resolutions, moved in the house of commons, by the chancel-

lor of the exchequer, as tables of export duties, to which their bill should refer. I have inclosed in another letter, with which this will be accompanied, a copy of the bill itself, which will, however, undergo several alterations. These will be found to be explained (as far as I am acquainted with them) in the letter above mentioned.

I have the honour to be, &c.

(Signed) WILLIAM PINKNEY.

Hon. James Madison,
Secretary of State.

Mr. Canning to Mr. Pinkney.

Foreign Office, February 22, 1808.

SIR,

I have already had the honour of assuring you in conversation, of the disposition which is felt by the *British* government, to give due weight to the observations which you have made to me, respecting the unfavourable impression likely (in your opinion) to be excited in the *United States*, by the duty proposed to be levied upon cotton, destined for the use of the enemy, but brought into the ports of this country, conformably to the tenor of the orders of council of the 11th of *November* last.

You are already apprised, that the principle, upon which the whole of this measure has been framed, is that of refusing to the enemy those advantages of commerce which he has forbidden to this country.

The simple method of enforcing this system of retaliation, would have been to follow the example of the enemy, by prohibiting altogether, all commercial intercourse between him and other states.

It was from considerations of indulgence to neutral trade, that the more mitigated measure of permitting intercourse under the restraints and regulations of a duty, in transitu, was adopted; and being adopted with this view, it was not immediately felt by the *British* government, that there might be a

distinction taken by neutral states, with respect to articles the produce of their own soil; and that while the commutation of prohibition into duty was acknowledged as an indulgence, when applied to articles of foreign commerce, of which they were only the carriers, it might be considered as an invidious imposition when applied to their own productions.

The moment that this distinction has been explained to the *British* government, they have been desirous of manifesting every attention to it; and if you, sir, had been possessed of the necessary authority from your government, there would have been no difficulty in entering into a specific agreement with you upon the subject. In order, however, to obviate the objection, in a great degree, I have the honour to inform you, that it is intended to be proposed to parliament, that all cotton, brought into this country, in conformity to the orders of council, should be absolutely prohibited from being exported to the territories of the enemy. But as you are not prepared to take upon yourself to say, that in no case the option would be acceptable, an option will still be left to the neutral owner, either to acquiesce in the total prohibition, or to reexport the article, on the payment of such a duty as parliament may judge it expedient to impose.

I flatter myself, sir, that this alteration in the legislative regulations, by which the orders of council are intended to be carried into execution, will be considered by you as a satisfactory evidence of the disposition of his majesty's government, to consult the feelings as well as the interests of the *United States*, in any manner which may not impair the effect of that measure of commercial restriction, to which the necessity of repelling the injustice of his enemies has obliged his majesty, reluctantly, to have recourse.

I have the honour to be, &c.

(Signed) GEORGE CANNING.

William Pinkney, Esq. &c. &c. &c.

Mr. Pinkney to Mr. Canning.

Great Cumberland Place, February 23, 1808.

Mr. *Pinkney* presents his compliments to his excellency, Mr. *Canning*, and has the honour to acknowledge the receipt of his note of yesterday, relative to an alteration on the subject of cotton, in the legislative regulations, by which the late orders in council are intended to be carried into execution, which Mr. *Pinkney* will hasten to transmit to his government.

Mr. *Pinkney* requests Mr. *Canning* to accept the assurances of his high consideration.

Mr. Pinkney to Mr. Madison.

(EXTRACTS.)

London, May 9, 1808.

I had a conversation with Mr. *Canning* on *Friday* last, in consequence of the arrival of the *Osage*.

As it was obviously expected that I should seek an interview with him, I went to *Downing*-street on the 5th with that object. He had been indisposed, and was not at the office; but in answer to a note which I sent him in the evening, he asked to see me next day at his house in *Bruton*-street.

The *Osage* had for some time been looked for with considerable anxiety, and the government had apparently anticipated a communication (and perhaps a proposal) of some importance, from me, as soon as my despatches should be received. As I had, in fact, no communication to make, it seemed to be proper that I should render the disappointment of as little moment as possible, by the manner of announcing it, without, however, putting any thing to hazard by an indiscreet manifestation of unnecessary solicitude.

The little which I supposed it requisite to say on this occasion appeared to be very well received: and, if any disagreeable impression was left on the mind of Mr. *Canning*, it certainly was not visible. A feeling of regret was perhaps perceptible, and a hope was intimated that the time was not far distant, when I should be enabled to do what, at present, was out of

my power; but nothing occurred which could be construed into a symptom of impatience, jealousy or dissatisfaction. There was, undoubtedly, no real ground for any thing of this sort; but it was, notwithstanding, quite possible that the importance, which it had become a habit to attach to the arrival of the *Osage*, from circumstances principally accidental, might have produced a disposition to think otherwise.

I thought it advisable to make use of this opportunity (although the topic was, in many views, more delicate than it had been) to suggest the propriety of yielding, as the moment was sufficiently favourable to such a course, upon the subject of the late orders in council, of which I had seen nothing to change my original opinion. There was reason to apprehend, however, that it might be worse than useless to press the suggestion, upon my own authority merely, while I could say nothing of the *French* decrees: and, accordingly, I forebore to do so.

An idea has evidently gone forth, since the *Osage* arrived, founded upon rumours of a doubtful description, that our relations with *France* have grown to be extremely precarious, and that we are consequently about to come to an understanding of a very friendly kind with *Great Britain*. It is not improbable that the government has, in some degree at least, adopted this idea.

I have the honour to inclose a copy of a notification, recently received from Mr. *Canning*, of the blockade of *Copenhagen*, and of the other ports in the island of *Zealand*, which I have caused to be communicated in the usual manner, to our consuls and citizens."

"There being no particular inducement for detaining the *Osage*, lieutenant *Lewis*, who will be charged with my letters, will leave town the day after to-morrow; and the ship will sail as soon after he reaches *Falmouth* as possible."

(NOTIFICATION.)

Mr. Canning to Mr. Pinkney.

The undersigned, his majesty's principal secretary of state for foreign affairs, has received his majesty's command to ac-

quaint Mr. *Pinkney*, that his majesty has judged it expedient to establish the most rigorous blockade of the port of *Copenhagen*, and of all the other ports in the island of *Zealand*. Mr. *Pinkney* is therefore requested to apprize the *American* consuls and merchants residing in *England*, that the entrances of all the ports above mentioned are, and must be considered as being in a state of blockade, and that from this time all the measures authorized by the law of nations, and the respective treaties between his majesty and the different neutral powers, will be adopted and executed with respect to all vessels attempting to violate the said blockade after this notice.

The undersigned requests Mr. *Pinkney* to accept the assurances of his high consideration.

(Signed) GEORGE CANNING.

Foreign Office, May 4, 1808.

Extract of a Letter from Mr. Pinkney, to the Secretary of State of the United States, dated

London, June 5, 1808.

"I have the honour to acknowledge the receipt of your letter of the 4th of *April*, by Mr. *Bethune*, together with the printed, and other copies of papers mentioned in it.

I am to have an interview with Mr. *Canning* in a few days (which he will agree to consider extraofficial) in the course of which I intend to press, by every argument in my power, the propriety of their abandoning immediately their orders in council, and of proposing in *America* (the only becoming course, as you very properly suggest) reparation for the outrage on the *Chesapeake*. I shall for obvious reasons do this, informally, as my own act.

Your unanswerable reply to Mr. *Erskine's* letter, of the 23d *February*, has left nothing to be urged against the orders in council upon the score of right; and there may be room to hope that the effect, which that reply can hardly have failed to produce upon ministers, as well by its tone as by its reasoning, will, if followed up, become, under actual circumstances, deci-

sive. The discussion, which Mr. *Rose's* preliminary in the affair of the *Chesapeake*, has undergone, gives encouragement to an expectation, that this government will not now be backward to relinquish it, and to renew their overture of satisfaction in a way more consistent with reason and more likely to produce a just and honourable result.

You may be assured that I will not commit our government by any thing I shall do or say, and that, if I cannot make things better than they are, I will not make them worse.

My view of the course which our honour and our interests have required, and still require, is, as you know, in precise conformity with that of the president; but if it were otherwise, I should make his view, and not my own, the rule of my conduct."

Extracts of a Letter from Mr. Pinkney to Mr. Madison.

London, August 4, 1808.

"The *St. Michael* arrived at *Falmouth* on *Thursday* the 14th of last month, after a passage of eight days from *L'Orient*. Captain *Kenyon* delivered to me on *Wednesday*, the 20th (upon my arrival in town from *Brighton*, where I had been for a short time on account of my health) your letters of the 30th of *April*, and your private letter of the 1st of *May*, together with newspapers, printed copies of the embargo act and its supplements, and of papers laid before congress at their last session. Mr. *Hall* brought me a letter from general *Armstrong* of the 26th of *June*, (of which I send an extract) and Mr. *Upson* brought me a private letter from him with the following postscript of the 1st of *July*. "An order has been received from *Bayonne* to condemn eight other of our ships."

On *Friday* the 22d of *July*, I had an interview with Mr. *Canning*, and renewed my efforts to obtain a revocation of the *British* orders of *January* and *November* 1807, and of the other orders dependent upon them. I have already informed you in my private letter of the 29th of *June*, that on the morning of its date, I had a long conversation with Mr. *Canning*, which

had rendered it somewhat probable that the object mentioned in your letter of the 30th of *April* (of which I had received a duplicate by the packet) would be accomplished, if I should authorize the expectation which that letter suggests; but that some days must elapse before I could speak with any thing like certainty on the subject: and I have mentioned in another private letter (of the 10th of *July*) that it was understood between Mr. *Canning* and myself, that another interview should take place soon after the prorogation of parliament. In effect, however, Mr. *Canning* was not prepared to see me again, until the 22d of *July*, after I had been recalled to *London* by the arrival of the *St. Michael*, and had, in consequence, reminded him of our arrangement by a private note.

In the interview of the 29th of *June*, I soon found it necessary to throw out an intimation, that the power vested in the president by congress, to suspend the embargo act and its supplements, would be exercised as regarded *Great Britain*, if their orders were repealed, as regarded the *United States*. To have urged the revocation, upon the mere ground of strict right, or of general policy, and there to have left the subject, when I was authorized to place it upon grounds infinitely stronger, would have been, as it appeared to me, to stop short of my duty. Your letters to Mr. *Erskine* (which Mr. *Canning* has read and considered) had exhausted the first of these grounds, and endless discussions here, in every variety of form, in and out of parliament, had exhausted the second. There was, besides, no objection of any force, to my availing myself, without delay, of the powerful inducements, which the intimation in question was likely to furnish to *Great Britain*, to abandon her late system; and it seemed to be certain that, by delaying to present these inducements to Mr. *Canning's* consideration, I should not only lose much time, but finally give to my conduct a disingenuous air, which, while it must be foreign to the views and sentiments of the president, could hardly fail to make a very unfavourable impression upon the minds of Mr. *Canning* and his colleagues. I thought, moreover, that if I should reserve the suggestion for a late stage of our

discussions, it would be made to wear the appearance of a concession reluctantly extorted, rather than of what it was, the spontaneous result of the characteristic frankness and honourable policy of our government.

The intimation once made, a complete development of its natural consequences, if properly acted upon, followed of course; and taking advantage of the latitude afforded by the informal nature of a mere conversation, I endeavoured to make that development as strong an appeal as consistently with truth and honour, I could (and there was no necessity to do more) to the justice and the prudence of this government.

It was not possible, however, that Mr. *Canning* could require to be assisted by my explanations. It was plain, upon their own principles, that they could not equitably persevere in their orders in council, upon the foundation of an imputed acquiescence, on our part, in *French* invasions of our neutral rights, when it was become (if it was not always) apparent, that this imputation was completely and in all respects an error; when it was manifest that these orders, by letting loose upon our rights a more destructive and offensive persecution than it was in the power of *France* to maintain, interposed between us and *France*, furnished answers to our remonstrances against her decrees and pretexts for those decrees, and stood in the way of that very resistance which *Great Britain* affected to inculcate, as a duty, at the moment when she was taking the most effectual measures to embarrass and confound it; and when it was also manifest, that a revocation of those orders would, if not attended or followed by a revocation of the decress of *France*, place us at issue with that power, and result in a precise opposition, by the *United States*, to such parts of her anticommercial edicts as it became us to repel.

In a prudential view my explanations seemed still less to be required. Nothing could be more clear than that, if *Great Britain* revoked her orders, and entitled herself to a suspension of the embargo, her object (if it were any thing short of the establishment and practical support of an exclusive dominion over the seas) must, in some mode or other, be accomplish-

ed whether *France* followed her example, or not. In the first case, the avowed purpose of the *British* orders would be fulfilled, and commerce would resume its accustomed prosperity and expansion. In the last, the just resistance of the *United States* (more efficacious than that of the *British* orders) to *French* irregularities and aggressions, would be left to its fair operation (and it was impossible to mistake the consequences), while the commercial intercourse between the *United States* and *Great Britain*, being revived, would open the way for a return to good understanding, and, in the end, for an adjustment of all their differences."

"On the 29th of *July* I met Mr. *Canning* again, and was soon apprized that our discussions, if continued at all, must take a new form."

"As there is now no reason for detaining the *St. Michael*, she will be despatched immediately for *L'Orient*."

[EXTRACT.]

Mr. Pinkney to Mr. Madison.

London, September 6, 1808.

"I have an opportunity of writing by Mr. *Bethune*, who leaves town to-morrow for *Falmouth*, to embark for the *United States* in the *British* packet; and I cannot omit to take advantage of it, although I have still nothing conclusive to communicate.

The *Hope* arrived off *Falmouth*, and landed Mr. *Atwater*, on the 16th of last month, and immediately proceeded on her voyage to *Havre*, with a fair wind. Mr. *Atwater* arrived in *London* on the 20th, in the evening, and delivered your letter of the 18th of *July*.

My public letter of the 4th of *August* will have apprized you of the footing on which my different interviews with Mr. *Canning* left the subject of the *British* orders in council; and my private letter of the 2d of that month, will have made you acquainted with my intention to present, in an official note, what I had ineffectually suggested in conference.

To such a course there could not, even in the first instance, have been any other objection than that it was calculated to lead to discussion, rather than to adjustment; but, whatever might be its tendency, it is certain that I could have no inducement to resort to it, until it was indicated by Mr. *Canning* as indispensable, nor any motive to decline it afterwards.

At our last interview, and not before, it was unexpectedly found, that it was in that mode only, that I could obtain a knowledge of the light in which this government thought fit to view the overture I had been directed to make to it; and I determined, in consequence, to lay before it, in writing, the intentions of the president, with the same frankness which had characterized my verbal communications.

I have now the honour to transmit a copy of the note, which, in conformity with that determination, I delivered in person to Mr. *Canning* on the 26th of last month, a few days after its date. To this note no answer has yet been returned; but it is to be presumed that it will not be much longer withheld.

You will perceive, that some time had elapsed, after I had sent off my despatches by the *St. Michael*, (the 8th of *August*) before my note was presented. The truth is, that I had employed a part of that time in framing a note of great length, which, when nearly completed, I thought it prudent to abandon, in favour of one that held out fewer invitations to unprofitable discussions, which, although I would not shun them, if pressed upon me, I did not suppose it proper that I should seek.

I believed too, that a little delay on my part would be far from being disadvantageous. There would still be sufficient time for obtaining a final answer to my proposal, in season for the meeting of congress; and as the temper of this government, so far as it had been tried, had not appeared to be favourable to my purpose, I believed that I should act in the spirit of my instructions, and consult the honour of my government, by avoiding, under such circumstances, the appearance of urgency and precipitation.

Upon the terms or general plan of my note, it is not, I hope, necessary to remark. You will discover, that it was prepared under a persuasion that, whatever might be its effect, it was infinitely better to make it as conciliatory as, without a sacrifice of principle or national dignity, was possible.

The topics to be embraced by it were such as did not demand, but rather forbade, minute exposition. While it was difficult to urge in their full force without seeming to aim at exciting a disposition unfriendly to the object of my instructions, all the considerations which justified the *United States* in remonstrating against the *British* orders, it was yet more difficult, without a degree of harshness, scarcely suited to the occasion, and without also the hazard of indiscretion, to display in detail the signal injustice and impolicy of persevering in them, after what I had proposed. This could be done, and had been done in conversation; but it did not upon trial appear to be equally practicable, in the more formal and measured proceeding which I was now called upon to adopt.

I considered besides, that an overture so highly advantageous to *Great Britain*, which the *United States* were not bound to make by any obligations of equity, although it was wise to make it, did not require, with any view to the character of my country, or even to the success of the overture itself, to be again recommended by an anxious repetition of arguments already fully understood.

As soon as my note was prepared, I called at the foreign office to arrange an interview with Mr. *Canning*, for the purpose of enabling me to accompany the delivery of it with a communication, which I deemed important, as well as of affording him an opportunity of asking and receiving such explanations as he might desire. The interview took place on the 26th of *August*.

It had occurred to me that it would be proper (and could not be injurious) to read to Mr. *Canning*, from your letter to me of the 18th of *July*, a brief summary of the instructions under which I was acting. This had not been requested; but it could not be unacceptable, and it was, besides, well calculated to do justice to the liberal sentiments by which my instruc-

tions had been dictated, as well as to give weight to my efforts, in the execution of them.

I was led, by the reading of these passages, (without having originally intended it) into a more extensive explanation, than I had before attempted, of the influence which the proposal of my government would have, in truth, as well as in the judgment of the world, upon the supposed justice of their new system, as it affected the *United States*. To that explanation, with the particulars of which I will not, and indeed, for want of time, cannot, at present trouble you, I added a concise recapitulation of some of the prudential considerations which had been so often pressed before, and there I left the subject."

(EXTRACTS.)

Mr. Pinkney to Mr. Madison, dated

London, September 24, 1808.

"I am now enabled to transmit to you a copy of Mr. *Canning's* answer, received only last night, to my note of the 23d of *August*."

"I regret extremely that the views, which I have been instructed to lay before this government, have not been met by it as I had at first been led to expect. The overture cannot fail, however, to place in a strong light the just and liberal sentiments by which our government is animated, and, in other respects, to be useful and honourable to our country."

Mr. Pinkney to Mr. Canning.

Great Cumberland Place, August 23, 1808.

SIR,

I have had the honour, in consequence of the orders of the president, to recal your attention, in the course of several recent interviews, to the *British* orders in council of the 7th of *January* and 11th of *November* 1807, and to the various other orders founded upon or in execution of them: and I now take the liberty to renew, in the mode which I have understood to be indispensable, my instances on that subject.

I need scarcely remind you, sir, that the government of the *United States* has never ceased to consider these orders as violating its rights, and affecting most destructively its interests, upon grounds wholly inadmissible, both in principle and fact.

The letters of Mr. *Madison* to Mr. *Erskine*, of the 20th and 29th of *March* 1807, produced by the official communication of that minister of the order of the 7th of *January*, and the answer of Mr. *Madison* of the 25th of *March* 1808, to a like communication of the orders of the 11th of *November*, contained the most direct remonstrances against the system which these orders introduce and execute, and expressed the confident expectation of the president, that it would not be persisted in.

That expectation has not yet been fulfilled; but it has, notwithstanding, not been relinquished. The president is still persuaded that its accomplishment will result from a careful review, by his majesty's government, made in the spirit of moderation and equity, of the facts and considerations which belong to the occasion.

It is not my purpose to recapitulate, in this note, the statements and reasonings contained in the above mentioned letters of Mr. *Madison*, in support of the claim of the government of the *United States*, that the *British* orders be revoked. I content myself with referring to those letters for proofs which it is not necessary to repeat, and for arguments which I could not hope to improve.

But there are explanations which those letters do not contain, and which it is proper for me now to make. Even these, however, may be very briefly given, since you have already been made acquainted, in our late conversations, with all their bearings and details.

These explanations go to show, that, while every motive of justice conspires to produce a disposition to recal the orders of which my government complains, it is become apparent that even their professed object will be best attained by their revocation.

I have the honour to state to you, sir, that it was the intention of the president, in case *Great Britain* repealed her orders, as regarded the *United States*, to exercise the power vested in him by the act of the last session of congress, entitled "an act to authorize the president of the *United States*, under certain conditions, to suspend the operation of the act laying an embargo on all ships and vessels in the ports and harbours of the *United States*, and the several supplementary acts thereto," by suspending the embargo law and its supplements, as regards *Great Britain*.

I am authorized to give you this assurance in the most formal manner; and I trust that upon impartial inquiry it will be found to leave no inducement to perseverance in the *British* orders, while it creates the most powerful inducements of equity and policy to abandon them.

On the score of justice it does not seem possible to mistake the footing upon which this overture places the subject; and I venture to believe that in any other view there is as little room for doubt.

If, as I propose, your orders should be rescinded as to the *United States*, and our embargo rescinded as to *Great Britain*, the effect of these concurrent acts will be that the commercial intercourse of the two countries will be immediately resumed; while, if *France* should adhere to maxims and conduct derogatory to the neutral rights of the *United States*, the embargo, continuing as to her, will take the place of your orders, and lead, with an efficacy not merely equal to theirs, but probably much greater, to all the consequences that ought to result from them.

On the other hand, if *France* should concur in respecting those rights, and commerce should thus regain its fair immunities, and the law of nations its just dominion, all the alleged purposes of the *British* orders will have been at once fulfilled.

If I forbear to pursue these ideas through all the illustrations of which they are susceptible, it is because the personal conferences to which I have before alluded, as well as the obvious nature of the ideas themselves, render it unnecessary.

I cannot conclude this note without expressing my sincere wish, that what I have now suggested, in conformity with the liberal sentiments and enlightened views of the president, may contribute, not only to remove the more immediate obstacles to the ordinary intercourse of trade between your country and mine, in a manner consistent with the honour of both, but to prepare the way for a satisfactory adjustment of every question important to their future friendship.

I have the honour to be,
With the highest consideration,
Sir, your obedient servant,
(Signed) WILLIAM PINKNEY.

The Right Honourable George Canning, &c. &c.

Mr. Canning to Mr. Pinkney.

Foreign Office, September 23, 1808.

The undersigned, his majesty's principal secretary of state for foreign affairs, had the honour to receive the official letter addressed to him by Mr. *Pinkney*, minister plenipotentiary of the *United States*, respecting the orders in council issued by his majesty on the 7th of *January* and 11th of *November* 1807.

He has laid that letter before the king: and he is commanded to assure Mr. *Pinkney*, that the answer to the proposal which Mr. *Pinkney* was instructed to bring forward, has been deferred only in the hope that the renewed application, which was understood to have been recently made by the government of the *United States* to that of *France*, might in the new state of things which has arisen in *Europe*, have met with such a reception in *France* as would have rendered the compliance of his majesty with that proposal consistent, as much with his majesty's own dignity, and with the interests of his people, as it would have been with his majesty's disposition towards the *United States*.

Unhappily, there is now no longer any reason to believe, that such a hope is likely to be realized; and the undersigned is, therefore, commanded to communicate to Mr. *Pinkney* the

decision, which, under the circumstances as they stand, his majesty feels himself compelled, however unwillingly, to adopt.

The mitigated measure of retaliation, announced by his majesty in the order in council of the 7th of *January*, and the further extension of that measure (an extension in operation, but not in principle) by the orders in council of *November*, were founded (as has been already repeatedly avowed by his majesty) on the "unquestionable right of his majesty to retort upon the enemy the evils of his own injustice;" and upon the consideration, that "if third parties incidentally suffered by these retaliatory measures, they were to seek their redress from the power by whose original aggression that retaliation was occasioned."

His majesty sees nothing in the embargo, laid on by the president of the *United States* of *America*, which varies this original and simple state of the question.

If considered as a measure of impartial hostility against both belligerents, the embargo appears to his majesty to have been manifestly unjust, as, according to every principle of justice, that redress ought to have been first sought from the party originating the wrong. And his majesty cannot consent to buy off that hostility, which America ought not to have extended to him, at the expense of a concession made, not to *America*, but to *France*.

If, as it has more generally been represented by the government of the *United States*, the embargo is only to be considered as an innocent municipal regulation, which affects none but the *United States* themselves, and with which no foreign state has any concern; viewed in this light, his majesty does not conceive that he has the right or the pretension to make any complaint of it, and he has made none. But in this light there appears not only no reciprocity, but no assignable relation, between the repeal, by the *United States*, of a measure of voluntary self-restriction, and the surrender, by his majesty, of his right of retaliation against his enemies.

The government of the *United States* is not now to be informed, that the *Berlin* decree of *November* 21st, 1806, was

the practical commencement of an attempt, not merely to check or impair the prosperity of *Great Britain*, but utterly to annihilate her political existence, through the ruin of her commercial prosperity; that in this attempt, almost all the powers of the *European* continent have been compelled, more or less, to cooperate; and that the *American* embargo, though most assuredly not intended to that end, (for *America* can have no real interest in the subversion of the *British* power, and her rulers are too enlightened to act from any impulse against the real interests of their country) but by some unfortunate concurrence of circumstances, without any hostile intention, the *American* embargo did come in aid of the "blockade of the *European* continent," precisely at the very moment, when, if that blockade could have succeeded at all, this interposition of the *American* government would most effectually have contributed to its success.

To this universal combination, his majesty has opposed a temperate, but a determined retaliation upon the enemy; trusting that a firm resistance would defeat this project; but knowing that the smallest concession would infallibly encourage a perseverance in it.

The struggle has been viewed by other powers, not without an apprehension that it might be fatal to this country. The *British* government has not disguised from itself, that the trial of such an experiment might be arduous and long; though it has never doubted of the final issue. But if that issue, such as the *British* government confidently anticipated, has providentially arrived much sooner than could even have been hoped; if "the blockade of the continent," as it has been triumphantly styled by the enemy, is raised even before it had been well established, and if that system, of which extent and continuity were the vital principles, is broken up into fragments utterly harmless and contemptible; it is nevertheless important in the highest degree, to the reputation of this country, (a reputation which constitutes great part of her power) that this disappointment of the hopes of her enemies should not have been purchased by any concession; that not a doubt should remain to distant

times, of her determination and of her ability to have continued her resistance; and that no step, which could even mistakenly be construed into concession should be taken on her part, while the smallest link of the confederacy remains undissolved, or while it can be a question, whether the plan devised for her destruction, has, or has not, either completely failed, or been unequivocally abandoned.

These considerations compel his majesty to adhere to the principles on which the orders in council of the 7th of *January* and the 11th of *November* are founded, so long as *France* adheres to that system, by which his majesty's retaliatory measures were occasioned and justified.

It is not improbable, indeed, that some alterations may be made in the orders in council, as they are at present framed; alterations calculated not to abate their spirit or impair their principle, but to adapt them more exactly to the different state of things which has fortunately grown up in *Europe*, and to combine all practicable relief to neutrals with a more severe pressure upon the enemy.

But of alterations to be made with this view only, it would be uncandid to take any advantage in the present discussion: however, it might be hoped, that in their practical effect, they might prove beneficial to *America*, provided the operation of the embargo were not to prevent her from reaping that benefit.

It remains for the undersigned to take notice of the last paragraph of Mr. *Pinkney's* letter. There cannot exist, on the part of Mr. *Pinkney*, a stronger wish, than there does on that of the undersigned, and of the *British* government, for the adjustment of all the differences subsisting between the two countries.

His majesty has no other disposition than to cultivate the most friendly intercourse with the *United States*.

The undersigned is persuaded, that Mr. *Pinkney* would be one of the last to imagine, what is often idly asserted, that the depression of any other country is necessary, or serviceable to the prosperity of this. The prosperity of *America* is essentially the prosperity of *Great Britain*, and the strength and power

of *Great Britain* are not for herself only, but for the world. When those adjustments shall take place, to which, though unfortunately not practicable at this moment, nor under the conditions prescribed by Mr. *Pinkney*, the undersigned, nevertheless, confidently looks forward; it will perhaps be no insecure pledge for the countinuance of the good understanding between the two countries, that they will have learnt duly to appreciate each other's friendship; and that it will not hereafter be imputed to *Great Britain*, either on the one hand, that she envies *American* industry as prejudicial to *British* commerce, or, on the other hand, that she is compelled to court an intercourse with *America*, as absolutely necessary to her own existence.

His majesty would not hesitate to contribute, in any manner in his power, to restore to the commerce of the *United States*, its wonted activity; and if it were possible to make any sacrifice for the repeal of the embargo, without appearing to deprecate it as a measure of hostility, he would gladly have facilitated its removal, as a measure of inconvenient restriction upon the *American* people.

The undersigned is commanded, in conclusion, to observe, that nothing is said in Mr. *Pinkney's* letter, of any intention to repeal the proclamation, by which the ships of war of *Great Britain* are interdicted from all those rights of hospitality in the ports of the *United States*, which are freely allowed to the ships of his majesty's enemies.

The continuance of an interdiction which, under such circumstances, amounts so nearly to direct hostility, after the willingness professed, and the attempt made by his majesty, to remove the cause on which that measure had been originally founded, would afford but an inauspicious omen for the commencement of a system of mutual conciliation; and the omission of any notice of that measure in the proposal which Mr. *Pinkney* has been instructed to bring forward, would have been of itself a material defect in the overture of the president.

But the undersigned is commanded no farther to dwell upon this subject than for the purpose of assuring Mr. *Pinkney*, that on this and every other point in discussion between the two governments, his majesty earnestly desires the restoration of a perfect good understanding; and that his majesty would decline no measure for the attainment of that object, which should be compatible with his own honour and just rights, and with the interests of his people.

The undersigned requests Mr. *Pinkney* will accept the assurances of his high consideration.

(Signed) GEORGE CANNING.

Correspondence between Mr. Erskine and Mr. Madison.

Copy of a Letter from the Honourable David M. Erskine, Esq. Envoy Extraordinary and Minister Plenipotentiary of his Britannic Majesty, to the Secretary of State of the United States, dated

Washington, March 12, 1807.

SIR,

I am charged by his majesty to express to the government of the *United States*, his majesty's perfect confidence in their good sense and firmness in resisting the unjust pretensions contained in the decree issued by the *French* government at *Berlin*, on the 21st *November*, which, if suffered to take effect, must prove so destructive to the commerce of all neutral nations.

His majesty has learnt that the measures announced in this decree, have already, in some instances, been carried into execution by the privateers of the enemy, and there could be no doubt that his majesty would have an indisputable right to exercise a just retaliation. Neutral nations cannot, indeed, expect that the king should suffer the commerce of his enemies to be carried on through them, whilst they submit to the prohibition which *France* has decreed against the commerce of his majesty's subjects. But though this right of retaliation would unquestionably accrue to his majesty, yet his majesty is

unwilling, except in the last extremity, to have recourse to measures which must prove so distressing to all nations not engaged in the war against *France*.

His majesty, therefore, with that forbearance and moderation which have at all times distinguished his conduct, has determined, for the present, to confine himself to the exercise of the power given him by his decided naval superiority, in such a manner only as is authorized by the acknowledged principles of the law of nations, and has issued an order for preventing all commerce from port to port of his enemies, comprehending in this order, not only the ports of *France*, but those of such other nations, as, either in alliance with *France*, or subject to her dominion, have by measures of active offence, or by the exclusion of *British* ships, taken a part in the present war.

His majesty feels an entire confidence that the moderation and justice of this conduct will be duly appreciated by the *United States*, and has charged me to express to their government, in the strongest terms, the regret he has experienced in being thus compelled, in his own defence, to act in a manner which must prove in some degree embarrassing to the commerce of neutral nations, and his sincere desire to avoid any stronger measures, to which, however, if the injustice and aggression of his enemies should not be resisted by those nations, whose rights and interests are invaded by so flagrant a violation of all public law, it may be ultimately necessary for the king to have recourse.

I have the honour to be, &c.

(Signed) D. M. ERSKINE.

Hon. James Madison, Esq.
Secretary of State.

Mr. Madison to Mr. Erskine.

Department of State, March 20th, 1807.

Sir,

I have laid before the president your letter of the 12th instant, communicating the views of his *Britannic* majesty, in

relation to the *French* decree of *November* 21st, 1806, and the principle of retaliation, through the commerce of neutrals, who may submit to the operation of that decree; as also, the measure actually taken, of prohibiting all neutral commerce from port to port, of his enemies, not only the ports of *France*, but those of such other nations, as, either in alliance with *France*, or subject to her dominion, have, by measures of active offence, or by the exclusion of *British* ships, taken a part in the present war.

The president cannot be insensible, sir, to the friendship and confidence towards the *United States*, which are signified by his *Britannic* majesty in this communication. In making this acknowledgment, however, the president considers it not less incumbent on him, to reserve, for a state of things which it is hoped may never occur, the right of discussing the legality of any particular measures, to which resort may be had, on a ground of retaliation. At this time, it would suffice to observe, that it remains to be more fully ascertained, in what sense the decree in question will be explained, and to what extent it will be carried into execution; and consequently, whether in any case, the *United States* can be involved in questions concerning measures of retaliation, supposed to accrue to one belligerent, from such a proceeding, by another. But it is worthy the justice and the liberality of the *British* government, to recollect, that within the period of those great events, which continue to agitate *Europe*, instances have occurred, in which the commerce of neutral nations, more especially of the *United States* has experienced the severest distresses from its own orders and measures, manifestly unauthorized by the law of nations. The respect which the *United States* owe to their neutral rights, and the interest they have in maintaining them, will always be sufficient pledges, that no culpable acquiescence on their part, will render them accessory to the proceedings of one belligerent nation, through their rights of neutrality, against the commerce of its adversary.

With regard to the particular order issued against the trade of neutrals, from one port to another of the enemies of *Great*

Britain, no fair objection can lie against it, provided it be founded on, and enforced by, actual blockades as authorized by the law of nations. If, on the other hand, the order has reference, not to such a blockade, but to a supposed illegality of the neutral trade from one to another of the described ports, the remark is obvious, that on that supposition, the order is superfluous; the trade being, as interdicted by the law of nations, liable at all times, without any such order, to the capture of *British* cruisers and the condemnation of *British* courts; and if not interdicted as such by the law of nations, it can no otherwise be made illegal, than by a legal blockade of the ports comprehended in the order. This inference is applicable even to the case of a neutral trade between the ports of *France* herself; since it is not a principle of the acknowledged law of nations, that neutrals may not trade from one to another port of the same belligerent nation. And it would be an innovation on that law, not before attempted, to extend the principle to a neutral trade between ports of different countries, confessedly open in times of peace as well as of war.

If the *British* order refers for its basis, to the principle of retaliation against the *French* decree, it falls under the observations already made on that subject, and which need not be repeated.

I am, &c.

(Signed) JAMES MADISON.

Hon. David M. Erskine, &c. &c.

Mr. Madison to Mr. Erskine.

Department of State, March 25, 1808.

SIR,

Having laid before the president your letter of the 23d of *February*, explaining the character of certain *British* orders of council issued in *November* last, I proceed to communicate the observations and representations, which will manifest to

your government the sentiments of the president on so deep a violation of the commerce and rights of the *United States*.

These orders interdict to neutral nations, or rather to the *United States*, now the only commercial nation in a state of neutrality, all commerce with the enemies of *Great Britain*, now nearly the whole commercial world, with certain exceptions only, and under certain regulations, but too evidently fashioned to the commercial, the manufacturing, and the fiscal policy of *Great Britain;* and, on that account, the more derogatory from the honour and independence of neutral nations.

The orders are the more calculated to excite surprise in the *United States*, as they have disregarded the remonstrances conveyed in my letters of the 20th and 29th of *March* 1807, against another order of council, issued on a similar plea, in the month of *January* 1807. To those just remonstrances no answer was indeed ever given; whilst the order has continued in its pernicious operation against the lawful commerce of the *United States;* and we now find added to it, others, instituting still more ruinous depredations, without even the addition of any new pretext: and when, moreover, it is notorious that the order of *January* was of a nature greatly to overbalance, in its effects, any injuries to *Great Britain* that could be apprehended from the illegal operation of the *French* decree, on which the order was to retaliate, had that decree, in its illegal operation, been actually applied to the *United States*, and been acquiesced in by them.

The last orders, like that of *January*, proceed on the most unsubstantial foundation. They assume for fact, an acquiescence of the *United States*, in an unlawful application to them of the *French* decree: and they assume for a principle, that the right of retaliation accruing to one belligerent is not to have for its measure that of the injury received; but may be exercised in any extent, and under any modifications, which may suit the pleasure or the policy of the complaining party.

The fact, sir, is unequivocally disowned. It is not true that the *United States* have acquiesced in an illegal operation of the *French* decree: nor is it even true, that at the date of the *Bri-*

tish orders of *November* 11, a single application of that decree to the commerce of the *United States*, on the high seas, can be presumed to have been known to the *British* government.

The *French* decree in question has two distinct aspects; one clearly importing an intended operation within the territorial limits as a local law; the other apparently importing an intended operation on the high seas.

Under the first aspect, the decree, however otherwise objectionable, cannot be said to have violated the neutrality of the *United States*. If the governing powers on the continent of *Europe* choose to exclude from their ports, *British* property or *British* productions, or neutral vessels proceeding from *British* ports, it is an act of sovereignty which the *United States* have no right to controvert. The same sovereignty is exercised by *Great Britain*, at all times, in peace as well as in war, towards her friends as well as her enemies. Her statute book presents a thousand illustrations.

It is only, therefore, under the other aspect of the decree, that it can have violated neutral rights: and this would have resulted from its execution on the high seas, whether on the pretext of a nominal blockade, or with a view to enforce a domestic regulation against foreign vessels, not within the domestic precincts, but under the authority and protection of the law of nations.

Had then the *French* decree been executed on the high seas against the commerce of the *United States* with *Great Britain?* and have the *United States* acquiesced in the unlawful and injurious proceeding?

I state, sir, on undeniable authority, that the first instance, in which that decree was put in force against the neutral rights of the *United States*, was that of the *Horizon*, an *American* ship bound from *Great Britain* to *Lima*, wrecked within the territorial jurisdiction of *France*, but condemned under an exposition of the decree, extending to the high seas its operation against neutrals. This judicial decision took place as late as the 16th day of *October* 1807, and was not officially known to the minister plenipotentiary of the *United States* at *Paris* till some

time in *November*. At the date, therefore, of the first order of *Great Britain*, no injury whatever had been done to her, through an aggression on the commerce of the *United States*. No presumption even had been sufficiently authorized, that the express stipulations in the treaty of *France* with the *United States* would not exempt their commerce, at least, from the operation of any edict incompatible with them. At the date even of the latter orders of *November* 11, it appears that the only aggression, which had then occurred, was pretty certainly unknown to the *British* government, and could therefore have had no share in producing this alleged retaliation.

To the fact, that the case of the ship *Horizon* was the first that occurred, of an execution of the *French* decree on the high seas, I am able to add, that as late as the 30th of *November*, no other case had been brought into the *French* court of prizes. From accounts which have lately appeared, it is more than probable that unlawful captures by *French* cruisers have since taken place; but it remains to be known whether they are to be referred to the concurrence of the *French* government in the judgment pronounced in the case of the *Horizon*, or not rather to a *French* decree of the 17th of *December* last, professing to be a retaliation on the *British* orders of *November* 11.

I state with equal confidence, that at no time have the *United States* acquiesced in violations of their neutral rights injurious to *Great Britain*, or any other belligerent nation. So far were they, in particular, from acquiescing in the *French* decree of *November* 1806, that the moment it was known to their minister at *Paris*, he called for explanations of its meaning in relation to the *United States*, which were favourable, and uncontradicted by the actual operation of the decree; that he steadily watched over the proceedings under it, with a readiness to interpose against any unlawful extension of them to the commerce of the *United States;* that no time was lost, after the decree came to the knowledge of the government here, in giving him proper instructions on the subject; that he was equally prompt, on receiving the decision of the court in the case of the *Horizon*, in presenting to the *French* government a remon-

strance in terms which can never be censured for a defect of energy; and that by the first opportunity, after that decision reached the president, the particular instructions required by it were forwarded to that minister. Nor is it to be forgotten, that previous to the *British* orders of *November*, it had been explicitly communicated to the *British* government, by the *American* minister at *London*, that explanations, uncontradicted by any overt act, had been given to our minister at *Paris*, which justified a reliance, that the *French* decree would not be put in force against the *United States;* and that the communication was repeated to the *British* government immediately on the publication of those orders.

What more could have been required on the part of the *United States*, to obviate retaliating pretensions of any sort on the part of *Great Britain?* Retaliations are measures of rigour in all cases. Where they are to operate through a third and involuntary party, they will never be hastily resorted to, by a magnanimous or a just power; which will always allow to the third party, its right to discuss the merits of the case, and will never permit itself to enforce its measures without affording a reasonable time, for the use of reasonable means, for substituting another remedy. What would be the situation of neutral powers, if the first blow levelled through them by one belligerent against another, was to leave them no choice but between the retaliating vengeance of the latter, and an instant declaration of war against the former? Reason revolts at this, as the sole alternative. The *United States* could no more be bound to evade the *British* orders, by an immediate war with *France*, than they were bound to atone for the burning of the *French* ship of war on the shore of *North Carolina*, by an immediate resort to arms against *Great Britain.*

With respect to the principle assumed by the *British* orders, it is perfectly clear, that it could not justify them in the extent given to their operation, if the facts erroneously assumed could have been fully sustained.

Retaliation is a specific or equivalent return of injury, for injury received; and where it is to operate through the interests

of a third party, having no voluntary participation in the injury received, the return ought, as already observed, to be inflicted with the most forbearing hand.

This is the language of common sense, and the clearest equity. As the right to retaliate results merely for the wrong suffered, it cannot, in the nature of things, extend beyond the extent of the suffering. There may often be a difficulty in applying this rule with exactness, and a reasonable latitude may be allowable on that consideration. But a manifest and extravagant departure from the rule can find no apology.

What then is the extent of the injury experienced by *Great Britain* from the measures of her enemies, so far as the operation of those measures through the *United States*, can render them in any sense responsible?

A mere declaration by a belligerent, without the intention or the means to carry it into effect against the rights and obligations of a neutral nation, and thence against the interests of another belligerent, could afford no pretext to the latter, to retaliate at the expense of the neutral. The declaration might give just offence to the neutral, but it would belong to him alone to decide on the course prescribed by the respect he owed to himself. No real damage accruing to the belligerent, no indemnity could accrue.

For the same reason, a declaration of a belligerent which he is known to be either not in a situation, or not to intend to carry, but partially, into execution against a neutral, to the injury of another belligerent, could never give more than a right to a commensurate redress against the neutral. All remaining unexecuted, and evidently not to be executed, is merely ostensible; working no injury to any, unless it be in the disrespect to the neutral, to whom alone it belongs to resent or disregard it.

Bring the case before us to this plain and equitable test. The *French* decree of *November* 1806, undertook to declare the *British* isles in a state of blockade, to be enforced, if you please, against the neutral commerce of the *United States*, on the high seas, according to the faculty possessed for the purpose. As far as it was actually enforced, or an effect resulted from an appre-

hension that it could and would be enforced, it was an injury to *Great Britain*, for which, let it be supposed, the *United States* were answerable. On the other hand as far as it was not enforced, and evidently either would not or could not be enforced, no injury was experienced by *Great Britain*, and no remedy could lie against the *United States*. Now, sir, it never was pretended that, at the date of the first *British* order, issued in *January* 1807, any injury had accrued to, or was apprehended by *Great Britain*, from an execution of the *French* decree against the commerce of the *United States*, on the theatre of their neutral rights: so far from it, that the order stands self-condemned as a measure of retaliation, by expressly stating that the fleets of *France* and her allies, instead of being able to enforce the blockade of the *British* isles, were themselves confined to their own ports, by the entire superiority of the *British* navy: converting thus, by the strangest of reasonings, the security of *Great Britain* against injury from the *French* decree, into a title to commit injury on a neutral party. In the *November* orders also, whilst it is admitted that the *French* decree could not be but imperfectly executed, for want of means, it is asserted that the intention of the *French* decree, and not the injury accruing from its operation through the commerce of the *United States*, is the scale by which the retaliating injury against them is to be measured.

Such are the pretexts, and such the principles, on which one great branch of the lawful commerce of this country became a victim to the first *British* order, and on which the last orders are now sweeping from the ocean all its most valuable remains.

Against such an unprecedented system of warfare on neutral rights, and national independence, the common judgment and common feelings of mankind must for ever protest.

I touch, sir, with reluctance, the question, on which of the belligerent sides the invasion of neutral rights had its origin. As the *United States* do not acquiesce in these invasions by either, there could be no plea for involving them in the controversy. But as the *British* orders have made the decree of

France, declaring, contrary to the law of nations, the *British* islands in a state of blockade, the immediate foundation of their destructive warfare on our commerce, it belongs to the subject to remind your government of the illegal interruptions and spoliations suffered, previous to that decree, by the neutral commerce of the *United States*, under the proceedings of *British* cruisers and courts, and for the most part, in consequence of express orders of the government itself. Omitting proofs of inferior note, I refer to the extensive aggressions on the trade of the *United States* founded on the plea of blockades never legally established according to recognized definitions; to the still more extensive violations of our commerce, with ports of her enemies not pretended to be in a state of blockade; and to the *British* order of council issued near the commencement of the existing war. This order, besides its general interpolation against the established law of nations, is distinguished by a special ingredient, violating that law as recognized by the course of decisions in the *British* courts. It subjects to capture and condemnation all neutral vessels, returning with lawful cargoes, on the sole consideration, that they had, in their outward voyage, deposited contraband of war at a hostile port.

If the commerce of the *United States* could, therefore, in any case, be reasonably made the victim and the sport of mutual charges and reproaches between belligerent parties, with respect to the priority of their aggressions on neutral commerce, *Great Britain* must look beyond the epoch she has chosen, for illegal acts of her adversary, in support of the allegation on which she founds her retaliating edicts against our commerce.

But the *United States* are given to understand, that the *British* government has, as a proof of its indulgent and amicable disposition towards them, mitigated the authorized rigour it might have given to its measures, by certain exceptions peculiarly favourable to the commercial interests of the *United States*.

I forbear, sir, to express all the emotions with which such a language, on such an occasion, is calculated to inspire a nation

which cannot for a moment be unconscious of its rights, nor mistake, for an alleviation of wrongs, regulations, to admit the validity of which would be to assume badges of humiliation never worn by an independent power.

The first of these indulgences is a commercial intercourse with the dependencies of the enemies of *Great Britain*, and it is considered as enhanced by its being a deviation in favour of the *United States*, from the ancient and *established* principle of maritime law, prohibiting altogether such an intercourse in time of war.

Surely, sir, your government, in assuming this principle, in such terms, in relation to the *United States*, must have forgotten their repeated and formal protests against it, as these are to be found in the discussions and communications of their minister at *London*, as well as in explanations occasionally made on that subject to the *British* representative here. But permit me to ask more particularly, how it could have happened, that the principle is characterized as an ancient and established one? I put the question the more freely, because it has never been denied that the principle, as asserted by your government, was for the first time introduced during the war of 1750. It is, in fact, invariably cited and described, in all judicial and other official transactions, "as the rule of 1750." It can have no pretension, therefore, to the title of an *ancient* rule.

And instead of being an *established* rule or principle, it is well known that *Great Britain* is the only nation that has acted upon, or otherwise given a sanction to it. Nay, it is not even an established principle in the practice of *Great Britain* herself. When first applied in the war of 1756, the legality of a neutral trade with enemy's colonies was not contested by it. In certain cases only of the colonial trade the allegation was, that the presumptive evidence arising from circumstances, against the bona fide neutrality of the ownership, justified the condemnation as of enemy's property. If the rule of condemnation was afterwards, during that war, converted into the principle now asserted, it could not possibly have been in operation, in its new shape, more than a very few years. During the succeeding

war of 1778, it is admitted by every *British* authority, that the principle was never brought into operation. It may be regarded in fact, as having been silently abandoned. And within the period of war since its commencement in 1793, the manner in which the principle has been alternately contracted and extended, explained sometimes in one way, sometimes in another, rested now on this foundation, now on that, is no secret to those who have attended to its history and progress in the *British* orders of council, and the *British* courts of admiralty.

With the exception, therefore, of a period, the last in modern times from which authentic precedents of maritime law will be drawn, and throughout which the *United States*, more interested in the question than any other nation, have uniformly combated the innovation, the principle has not in the *British* tribunals been in operation for a longer term than three, four or five years, whilst in no others has it ever made its appearance but to receive a decision protesting against it.

Such is the antiquity, and such the authority of a principle, the deviations from which are held out as so many favours consoling the *United States* for the wide spread destruction of their legitimate commerce.

What must be said as to the other exceptions which seem to have been viewed as claims on the gratitude of the *United States?* Is it an indulgence to them in carrying on their trade with the whole continent of *Europe*, to be laid under the necessity of going first to a *British* port, to accept a *British* license, and to pay a tribute to the *British* exchequer, as if we had been reduced to the colonial situation which once imposed these monopolizing restraints?

What again must be said as to the other features which we see blended on the face of these regulations? If the policy of them be to subject an enemy to privations, why are channels opened for a *British* trade with them which are shut to a neutral trade? If, in other cases, the real object be to admit a neutral trade with the enemy, why is it required that neutral vessels shall perform the ceremony of passing through a *British* port, when it can have no imaginable effect but the known

and inevitable one of prohibiting the admission of the trade into the port of destination?

I will not ask why a primary article of our productions and exports, cotton-wool, is to be distinguished, in its transit, by a heavy impost, not imposed on other articles, because it is frankly avowed, in your explanation of the orders, to be intended as an encouragement to *British* manufactures, and a check to the rival ones of *France*? I suppress, also, though without the same reason for it, the inquiry, why less rigorous restrictions are applied to the trade of the *Barbary* powers, than are enforced against that of a nation, such as the *United States*, and in relations, such as have existed between them and *Great Britain*.

I cannot, however, pass without notice the very unwarrantable innovations, contained in the two last of the orders. In one of them, a certificate of the local origin of a cargo, although permitted in the port of departure, and required in the port of destination, by regulations purely domestic in both, and strictly analogous in principle to regulations in the commercial code of *Great Britain*, is made a cause of capture on the high seas, and of condemnation in her maritime courts. In the other order, the sale of a merchant ship, by a belligerent owner to a neutral, although a transaction as legal, when fair, as a dealing in any other article, is condemned by a general rule, without an atom of proof, or of presumption, that the transfer in the particular case, is fraudulent, and the property, therefore, left in an enemy.

In fine, sir, the president sees in the edicts communicated by you, facts assumed which did not exist; principles asserted, which never can be admitted; and, under the name of retaliation, measures transcending the limits reconcilable with the facts and the principles, as if both were as correct as they are unfounded. He sees, moreover, in the modifications of this system, regulations, violating equally our neutral rights and our national sovereignty. He persuades himself, therefore, that your government will see in the justice of the observations now made in addition to those I had the honour, verbally, to

state to you in the first instance, that the *United States* are well warranted in looking for a speedy revocation of a system, which is every day augmenting the mass of injury for which the *United States* have the best of claims to redress.

I have the honour to be,
With great respect and consideration,
Sir, yours, &c. &c.

(Signed) JAMES MADISON.

The Hon. David M. Erskine, &c. &c.

From Mr. Madison to Mr. Erskine.

Department of State, March 29th. 1807.

Sir,

Further reflection on the tenor and tendency of the order of his *Britannic* majesty, communicated by your letter of the 12th instant, which was answered by mine of the 20th, induces me to resume that important subject.

From the difficulty of supposing that the order can have for its basis, either a legal blockade impossible to be extended to all the ports described in the order, or a supposed illegality of the trade, between those ports, an illegality which has never been applied by the *British* government or its admiralty courts to an *accustomed* trade, even between the ports of the same belligerent nation, and is utterly at variance with the conduct of both in reference to a trade between a belligerent nation and its allies; a necessity seems to result of ascribing the order to the policy of countervailing, through the commerce of neutrals, the *French* decree of the 21st of *November* last.

In this view of the order, it demands, on the part of the *United States*, the most serious attention both to its principle, and to its operation.

With respect to its *principle*, it will not be contested that a retaliation by one nation on its enemy, which is to operate through the interest of a nation not an enemy, essentially requires not only that the injury inflicted should be limited by

the measure of injury sustained; but that every retaliating step, in such a case, should be preceded by an unreasonable failure of the neutral party to put an end, in some mode or other, to the inequality wrongfully produced.

Were it certain, therefore, that the *French* decree is to be enforced in the sense in which it is taken, and that in violation of the treaty between *France* and the *United States*, the commerce of the latter will not be exempted; the *British* order, being peremptory in its import, and immediate in its execution, might justly be regarded by the *United States*, as a proceeding equally premature and unfriendly.

But in the uncertainty as to the real meaning of that decree; and whilst a presumption offered itself, that the decree, if avowed and executed in an unlawful extent, might not embrace the commerce of the *United States*, they are bound by justice to their interests, as well as by respect for their rights, to consider the *British* order as a ground for serious complaint and remonstrance.

Should it prove that the decree had not the meaning ascribed to it, and particularly, should the respect of *France* for her treaties with the *United States* exempt their trade from the operation of the decree, the order of the *British* government will stand exposed to still severer comments. It will take the character of an original aggression, will furnish the *French* government, a like ground with that assumed by itself, for retaliating measures, and will derive a very unfavourable feature from the consideration, that it was a palpable infraction of a treaty just signed on the part of the *British* government, and expected, at the date of the order, to be speedily ratified on the part of the *United States*.

The necessity of presenting the subject in its true light, is strengthened by the *operation* which the *British* order will have on a vast proportion of the entire commerce of the *United States*. Not to dwell on the carrying branch of the commerce between the ports and countries of *Europe*, and which the immunity given by our flag in consequence of treaties with the enemies of *Great Britain*, to *British* property, and not enjoyed

by the property of her enemies, has hitherto been advantageous to *Great Britain;* and without inquiring into the effect of an application of the interdict, to the other quarters of the globe, all of which are evidently within the comprehensive terms of the order, it cannot be overlooked, that the character and course of nearly the whole of the *American* commerce with the ports of *Europe*, other than of *Great Britain*, will fall under the destructive operation of the order. It is well known that the cargoes exported from the *United States*, frequently require that they be disposed of, partly at one market, and partly at another. The return cargoes are still more frequently collected at different ports; and not unfrequently, at ports different from those receiving the outward cargoes. In this circuitous voyage, generally consisting of several links, the interest of the undertakers materially requires also either a trade or a freightage between the ports visited in the circuit. To restrain the vessels of the *United States*, therefore, from this legitimate and customary mode of trading with the continent of *Europe*, as is contemplated by the order, and to compel them on one hand to dispose of the whole of their cargoes at a port which may want but a part, and, on the other hand, to seek the whole of their returns at the same port, which may furnish but a part or perhaps no part of the articles wanted, would be a proceeding as ruinous to our commerce, as contrary to our essential rights.

These observations, which are made in conformity with the sentiments of the president, cannot fail, sir, to have all the weight with an enlightened and friendly government, to which they are entitled; and the president persuades himself, that the good effect of the truths which they disclose, will be seen in such measures as will remove all ground for dissatisfaction, and demonstrate, on that side, the same sincere disposition to cultivate harmony and beneficial intercourse, as is felt and evinced by the *United States* and their government.

I have the honour to be, &c.

(Signed) JAMES MADISON.

The Hon. David M. Erskine, Esqr.

REPORT

Of the Judges of the Supreme Court of the Commonwealth of Pennsylvania, made in pursuance of a Resolution of the Legislature of the said Commonwealth. Passed in the Session 1807-8: reported to the Senate and House of Representatives, on the 19th and 20th of December 1808.

To the Honorable the Senate and
House of Representatives of the Commonwealth of Pennsylvania.

THE undersigned judges of the supreme court of the said commonwealth, respectfully submit their report of the *English* statutes which are in force in the said commonwealth, and of those of the said statutes, which in their opinion, ought to be incorporated into the statute laws of the said commonwealth.

They have taken the liberty, at the same time, of submitting a few preliminary observations, connected with the subject of the report, and tending to explain the principles which have governed them, in the execution of the trust which the legislature have been pleased to confide in them.

The subject is divided into two branches. 1st. The ascertaining of such *English* statutes as are in force in this commonwealth. 2d. The opinion of the judges, which of the statutes so in force are proper to be incorporated into the statute laws of the commonwealth.

In order to accomplish the first part of the subject, it was necessary to begin with the consideration of the present constitution of the commonwealth. It contains nothing particular as to the point in question. There is a general provision, that all laws of this commonwealth, in force at that time, and not inconsistent with the said constitution, and all rights, &c. should continue as if the said alterations and amendments had not been made. The question still remained unanswered, what laws were in force; it appeared upon tracing the matter further back, that an act was passed on the 28th January 1777, entitled, "An act to revive and put in force, such and so much of the state

laws of the province of Pennsylvania, as is judged necessary to be in force in this commonwealth." In this act it is provided, that the common law, and such of the statute laws of *England* as have been heretofore in force in the said province, shall be in force, except as is hereafter excepted. The exception relates to the oath of allegiance to the king of *Great Britain*, the acknowledgment of any authority in the heirs of *William Penn*, the first proprietary, the laws ascertaining the number of members of assembly in any county, the time of election and qualification of electors, the *English* statutes relating to treason or misprision of treason, and such laws or acts of assembly as declared, ordered or directed, any thing inconsistent with the then existing constitution of the commonwealth.

Still the point remained open; what *English* statutes were in force in Pennsylvania? It became necessary therefore to mount up to the first sources of information; the charter granted to *William Penn*, and the general principles of colonization.

It is provided by the charter, that the laws for the regulating and governing of property, as well for the descent and enjoyment of lands, as likewise for the enjoyment and succession of goods and chattels, and likewise as to felonies, within the said province, shall be and continue the same as they shall be for the time being, by the general course of the law in the kingdom of *England*, until the said laws shall be altered by the said *William Penn*, his heirs or assigns, and by the freemen of the said province, their delegates or deputies, or the greater part of them. Notwithstanding the generality of these expressions, it has always been held, that many of the *English* laws, relating both to property and to felonies, would have been improper for the state of things in an infant colony; and accordingly they were never practically extended here. It is the true principle of colonization, that the emigrants from the mother country carry with them, such laws as are useful in their new situation, and none other. A multitude of *English* statutes, relating to the king's prerogative, the rights and privileges of the nobility and clergy, the local commerce and revenue of *England*, and other subjects unnecessary to enumerate, were improper to

be extended to *Pennsylvania*. In order to execute the duty required of them, it was necessary for the judges to examine the code of *English* statute law from the beginning to the time of the settlement of *Pennsylvania;* and to weigh deliberately which of them were proper to be adopted. But this was not all; it was essential that our own statute book should be examined, to see in what cases the *English* law had been altered, or in what cases it had been expressly extended here. Wherever our own legislature had enacted a law, on the same subject on which an *English* statute was to be found, it has been supposed that the *English* statute had no force here, even though it contained more extensive provisions than our own act of Assembly; because it was reasonable to presume, that our assembly was acquainted with the *English* statute, and designedly omitted some of its provisions.

Besides these inquiries, it was necessary to ascertain what had been the decision of our own courts, respecting the extension of *English* statutes. This was no easy task, as we have no printed reports prior to our revolution, of cases determined in our courts of justice. Of course these decisions are only to be known by tradition, or manuscript notes in the possession of gentleman of the bar, or the judges.

With respect to *English* statutes enacted since the settlement of *Pennsylvania*, it has been assumed as a principle, that they do not extend here, unless they have been recognized by our acts of assembly, or adopted by long continued practice in courts of justice. Of the latter description there are very few, and those, it is supposed, were introduced from a sense of their evident utility. As *English* statutes they had no obligatory force, but from long practice they may be considered as incorporated with the law of our country.

Having endeavoured to ascertain the *English* statutes which were in force, the judges proceeded to the second part of the subject; the consideration of which of these statutes were proper to be incorporated with our own law. They felt that this part of their task, though very honourable, was very arduous, and in executing it, they have thought themselves

bound to proceed with great caution. In works which consist in the alteration of long established usages, it is safer to do too little than too much. The most experienced builder, cannot always calculate the exact effect of removing a stone. If further alterations should be necessary, it is always competent to the legislature to make them. It will be found by the report, that in a number of cases, the repeal of *English* statutes is recommended. In a number of others which appeared doubtful, it was thought best, to leave them for further experience.

In perusing the statutes referred to in the report, the legislature will perceive, that in many of them, the language is uncouth and unsuited to our present form of government. In many of them too, they will find here and there a sentence not properly applicable to any other country than *England*. There is no other way of curing these defects than by reenacting the substance of these statutes in language suitable to our present condition, which might be attended with the additional advantage of simplifying the statute law, by reducing into one, several acts passed on the same subject. This would be a work of labour. Something of the kind has been done in the states of *Virginia* and *New York*, but it is believed that several years were employed in the performance.

From the outline which has been drawn, the legislature will easily perceive the difficulties attending the report now presented to them, and their candour will induce them to bear in mind, that it has been executed during the short intervals of official occupation. The judges dare not flatter themselves, that the performance approaches to perfection. They trust, however, that it will not be found more defective than might reasonably be expected.

WM. TILGHMAN,
J. YEATES,
THOMAS SMITH,
H. H. BRACKENRIDGE.

December 14, 1808.

REPORT of the Judges of the Supreme Court of Pennsylvania of the English Statutes, which are in force in the Commonwealth of Pennsylvania; and of those of the said Satutes which, in their opinion, ought to be incorporated into the Statute Laws of the said Commonwealth.

N. B. Ruffhead's edition of the English Statutes at large, is referred to in this Report. The opinion of the Judges is expressed under the title of each statute, whether the same ought to be incorporated.

Book and Page.	Year and Reign.	Titles of the Statutes.
1 Ruffhead 3	9th Henry III. chap. 7.	"A widow shall have her "marriage, inheritance and "quarantine." That part only of this statute is in force which provides, that a widow shall tarry in the chief house of her husband 40 days after her husband's death, within which days her dower shall be assigned her.—*To be incorporated.*
Id. 9	9th Henry III. chap. 34.	"In what only case a wo- "man shall have an appeal of "death."—*Not to be incorporated.*
Id. 16	20th Henry III. chap. 1.	"A woman shall recover "damages in a writ of dow- "er."—*To be incorporated.*
Id. 16	20th Henry III. chap. 2.	"Widows may bequeath "the crops of their lands."—*To be incorporated.*
Id. 16	20th Henry III. chap. 3.	"Inquiry and Punishment "of Redisseisin."—*To be incorporated.*
Id. 19	20th Henry III. chap. 9.	"He is a Bastard that is "born before the marriage of "his parents."—*To be incorporated.*
Id. 20	21st Henry III.	"The day of the Leap "Year, and the day before, "shall be holden for one "day."—*To be incorporated.*

Book and Page.	Year and Reign.	Titles of the Statutes.
1 Ruffhead 31	52d Henry III. chap. 4.	"A Distress shall not be "driven out of the county, "and it shall be reasona- "ble."—*To be incorporated.*
Id. 35	52d Henry III. chap. 8.	"The punishment of those "who commit Redisseisin."—*To be incorporated.*
Id. 35	52d Henry III. chap. 13.	"After issue joined there "shall be but one Essoin or "one default."—*Not to be incorporated.*
Id. 36	52d Henry III. chap. 15.	"In what places, Distresses "shall not be taken."—*To be incorporated.*
Id. 37	52d Henry III. chap. 17.	"The authority and duty of "Guardian in Socage."—*To be incorporated.*
Id. 39	52d Henry III. chap. 29.	"In what case a writ of "Entry sur Disseissin in the "post doth lie."—*To be incorporated.*
Id. 43	3d Edward I. chap. 9.	"All men shall be ready to "pursue Felons." That part only of this statute is in force which provides that "all, generally, shall be "ready at the commandment "and summons of sheriffs, and "at the cry of the country, "to pursue and arrest Felons, "where any need is."—*To be incorporated.*
Id. 54	3d Edward I. chap. 40.	"Voucher to warranty and "counter pleading of vouch- "er."—*To be incorporated.*
Id. 56	3d Edward I. chap. 42.	"Certain actions, wherein "after appearance the tenant "shall not be essoined."—*Not to be incorporated.*
Id. 56	3d Edward I. chap. 43.	"There shall be no Four- "cher by Essoin."—*Not to be incorporated.*

Book and Page.	Year and Reign.	Titles of the Statutes.
1 Ruffhead 56	3d Edward I. chap. 44.	"In what case, Essoin ultra "mare, shall not be allow-"ed."—*Not to be incorporated.*
Id. 57	3d Edward I. chap. 47.	"In what case the nonage "of the heir of the Disseissor "or Disseisee, shall not pre-"judice." The whole of this statute is in force, except those parts which relate to Prelates, men of Religion, and writs of attaint.—*To be incorporated.*
Id. 58	3d Edward I. chap. 49.	"The tenant's plea in a writ "of dower."—*To be incorporated.*
Id. 60	4th Edward I. statute 2d.	"Concerning the duty of a "Coroner." This statute is in force, except those parts, which relate to the Coroner's duty in the following points viz:—making inquiry as to the property of any person, or seizing the property of any person—Treasure that is found—appeal of rape or of wounds, or any other appeals—Deodands—and wrecks of the sea—and also except that part which provides, that land shall remain in the king's hands, until the lords of the Fee, have made fine for it.—*To be incorporated.*
Id. 65	6th Edward I. chap. 1.	"Several actions wherein "damages shall be recover-"ed."—*To be incorporated.*
Id. 65	6th Edward I. chap. 2.	"In what case nonage of "the Plaintiff shall not stay an "inquest."—*To be incorporated.*
Id. 65	6th Edward I. chap. 3.	"An alienation of land by "the tenant, by the courtesy

Book and Page.	Year and Reign.	Titles of the Statutes.
1 Ruffhead 65	6th Edward I. chap. 3.	"with warranty shall be "void."—*To be incorporated.*
Id. 66	6th Edward I. chap. 5.	"Several tenants against "whom an action of waste is "maintainable." The whole of this Statute is in force, except that part which relates to waste in the time of wardship, which is not applicable to this country.—*To be incorporated.*
Id. 66	6th Edward I. chap. 6.	"Where divers heirs shall "have one assize of Mort "D'Ancestor."—*To be incorporated.*
Id. 68	6th Edward I. chap. 10.	"The husband and wife be- "ing impleaded, shall not "fourch by Essoin."—*Not to be incorporated.*
Id. 69	6th Edward I. chap. 13.	"No waste shall be made, "hanging a suit for the land." —*To be incorporated.*
Id. 78	13th Edward I. stat. 1. chap. 1.	"In gifts in tail the Donor's "will shall be observed. The "form of a Formedon." This statute is in force except such part as has been altered by an act of Assembly passed 27th January 1749, (old style) entitled "An act for barring estates Tail," and another act passed 16th January, 1799, entitled "An act to facilitate the barring of entails."—*To be incorporated.*
Id. 81	13th Edward I. stat. 1. chap. 3.	"A Cui in vita for the wife "—when a wife or he in re- "version shall be received."— *To be incorporated.*
Id. 82	13th Edward I. stat. 1. chap. 4.	"Where the wife shall be "endowable of lands recover- "ed against her husband.—

Book and Page.	Year and Reign.	Titles of the Statutes.
1 Ruffhead 82	13th Edward I. stat. 1. chap. 4.	"Where the heir may avoid a "Dower recovered—A reme- "dy for particular tenants los- "ing by default." This statute is in force, except that part which relates to proceedings in a writ of right. —*To be incorporated.*
Id. 86	13th Edward I. stat. 1. chap. 6.	"The penalty if a tenant "impleaded, voucheth, and "the vouchee denieth his war- "ranty."—*To be incorporated.*
Id. 86	13th Edward I. stat. 1. chap. 7.	"Admeasurement of Dow- "er for the Guardian and the "Heir, and the process there- "in."—*To be incorporated.*
Id. 90	13th Edward I. stat. 1. chap. 11.	"The master's remedy "against their servants, and "other accountants."—*To be incorporated.*
Id. 91	13th Edward I. stat. 1. chap. 12.	"The appellant being ac- "quitted, the appellor and "abettors shall be punished— "There shall be no essoin for "the appellor."—*Not to be incorporated.*
Id. 92	13th Edward I. stat. 1. chap. 14.	"The process in an action "of waste—a writ to inquire "of waste."—*To be incorporated.*
Id. 92	13th Edward I. stat. 1. chap. 15.	"An infant eloined may "sue by Prochein Amy." *To be incorporated.*
Id. 93	13th Edward I. stat. 1. chap. 17.	"In what case Essoin de "malo lecti doth lie, and "where."—*Not to be incorporated.*
Id. 94	13th Edward I. stat. 1. chap. 20.	"The tenant's answer, in "a writ of Cossinage, Aiel or "Besaiel."—*To be incorporated.*

Book and Page.	Year and Reign.	Titles of the Statutes.
1 Ruffhead 94	13th Edward I. stat. 1. chap. 22.	"Waste maintainable by one "tenant in common against "another."—*To be incorporated.*
Id. 95	13th Edward I. stat. 1. chap. 23.	"Executors may have a "writ of account."—*To be incorporated.*
Id. 95	13th Edward I. stat. 1. chap. 24.	"A writ of a nuisance of "house &c. levied and aliened "to another—A Quod per-"mittat, and juris utrum, for "a parson of a church—In "like cases, like writs be "grantable." This statute is in force, except those parts which relate to ecclesiastical persons.—*To be incorporated.*
Id. 95	13th Edward I. stat. 1. chap. 25.	"Of what things an assize "shall lie—Certificate of as-"size—Attachment in an as-"size." This statute is in force, except that part which gives the remedy by assize in cases of keeping of parks, woods, forests, chases, warrens, gates, and other bailiwicks and offices, in fee—Also that part which gives an immediate remedy by assize, in case any person holding land for term of years, aliens the same in Fee, and by such alienation the Freehold is transferred to the Feoffee—Also that part which authorizes the Sheriff to take an ox for his fee.—*To be incorporated.*
Id. 97	13th Edward I. stat. 1. chap. 26.	"Who may bring a writ of "Redisseisin, and the punish-"ment of the offender there-"in."—*To be incorporated.*

Book and Page.	Year and Reign.	Titles of the Statutes.
1 Ruffhead 97	13th Edward I. stat. 1. chap. 27.	"Essoin after inquest, but "none after day given Prece "Partium."—*Not to be incorporated.*
Id. 98	13th Edward I. stat. 1. chap. 30.	"The authority of justices "of Nisi Prius—Adjournment of Suits—Certain writs "that be determinable in their "proper counties—A Jury "may give their verdict at "large—None but which were "summoned shall be put in "assizes or juries." The following parts only of this statute are in force—Sec. 3, and when such inquests be taken they shall be returned into the Bench and there shall judgment be given, and there they shall be enrolled. The Justices of Nisi Prius shall have clerks, to enrol all pleas pleaded before them.—The said Justices shall not compel the Jurors to say precisely whether it be a Disseisin or not, so that they show the truth of the deed, and require aid of the said Justices.—But if they, of their own head, will say that it is a Disseisin, their verdict shall be admitted at their own peril.—*To be incorporated.*
Id. 99	13th Edward I. stat. 1. chap. 31.	"An exception to a plea "shall be sealed by the Justices."—*To be incorporated.*
Id. 101	13th Edward I. stat. 1. chap. 34.	"It is felony to commit a "rape—A married woman "elopeth with an avowterer "—The penalty of carrying a "man from his house."

Book and Page.		Year and Reign.	Titles of the Statutes.
1 Ruffhead	101	13th Edward I. stat. 1. chap. 34.	That part only of this statute is in force, which enacts, that "if a wife willingly leave her husband and go away, and continue with her avowterer, she shall be barred for ever of action to demand her dower that she ought to have of her husband's lands, if she be convicted thereupon, except that her husband willingly reconcile her and suffer her to dwell with him, in which case she shall be restored to her action. —*To be incorporated.*
Id.	104	13th Edward I. stat. 1. chap. 39.	"The manner to deliver "writs to the Sheriff to be exe- "cuted.—The Sheriff return- "eth 'a Liberty,' when none "is returning of issues.—Re- "sistance of execution of pro- "cess." Those parts only of this statute are in force which define "what shall be accounted issues" direct the punishment of the Sheriff for false returns, give authority to the Sheriff to do certain things, in case of resistance of the execution of Process, and direct the punishment of those who resist the execution of Process.—*To be incorporated.*
Id.	106	13th Edward I. stat. 1. chap. 40.	"A woman's suit shall not "be deferred by the minority "of the heir."—*To be incorporated.*
Id.	109	13th Edward I. stat. 1. chap. 45.	"The process of execution "of things recorded within "the year or after."—*To be incorporated.*

Book and Page.	Year and Reign.	Titles of the Statutes.
1 Ruffhead 123	18th Edward I. stat. 2d.	"Statute of Quo Warran-"to."—*To be incorporated.*
Id. 123	18th Edward I. stat. 3d.	"Another new statute of "Quo Warranto."—*To be incorporated.*
Id. 124	18th Edward I. stat. 4th.	"The manner of levying Fines."—*To be incorporated.*
Id. 125	20th Edward I. stat. 1st.	"The statute of Vouchers."*To be incorporated.*
Id. 126	20th Edward I. stat. 2d.	"A statute of Waste."—*To be incorporated.*
Id. 127	20th Edward I. stat. 3d.	"Statute De Defensione "Juris."—*To be incorporated.*
Id. 134	27th Edward I. stat. 1. chap. 1.	Statute "De Finibus leva-"tis."—*To be incorporated.*
Id. 139	28th Edward I. stat. 2d.	"A statute for persons appealed."—*Not to be incorporated.*
Id. 145	28th Edward I. stat. 3. chap. 16.	"What shall be done with "them that make false re-"turns."—*To be incorporated.*
Id. 149	33d Edward I. stat. 2d.	"Who be conspirators, and "who be champertors." That part only of this statute is in force, which relates to "conspirators," and from that part is to be excepted what relates to "Stewarts and Bailiffs of great Lords."—*To be incorporated.*
Id. 150	33d Edward I. stat. 3.	"The Statute of Champer-"ty." That part only of this Statute is in force, which relates to Conspirators.—*To be incorporated.*
Id. 151	33d Edward I. stat. 4.	"An Ordinance for In-"quests."—*To be incorporated.*
Id. 152	33d Edward I. stat. 6.	"An Ordinance for mea-"suring of land."—*To be incorporated.*

Book and Page.	Year and Reign.	Titles of the Statutes.
1 Ruffhead 153	34th Edward I. stat. 1st.	"The statute de Conjunctim feoffatis." This statute is in force, except those parts which relate to Writs of "Juris utrum" and "Indicavit."—*To be incorporated.*
Id. 174	12th Edward II. stat. 1. chap. 1.	"Tenants in Assize of "Novel Disseisin may make "Attorneys."—*To be incorporated.*
Id. 175	12th Edward II. stat. 1. chap. 4.	"Justices of Nisi Prius, "shall record nonsuits, de-"faults," &c. Only those parts of this statute are in force, which are distinguished by the numbers 1, 2 and 6.—*To be incorporated.*
Id. 175	12th Edward II. stat. 1. chap. 5.	"An Indenture shall be "made between the Sheriff "and Bailiff of liberty of "every return." That part only of this statute is in force, which obliges Sheriffs and other officers, to sign their names to the return of Writs.—*To be incorporated.*
Id. 177	12th Edward II. stat. 2d.	"The statute of Esseins." *Not to be incorporated.*
Id. 178	15th Edward II.	"A statute concerning "Fines." This statute is in force, except that part which relates to the admission of Attorneys." *To be incorporated.*
Id. 201	2d Edward III. chap. 16.	"Nisi Prius may be grant-"ed, as well at the Tenant's "suit as at the Demandant's." *To be incorporated.*

Book and Page.	Year and Reign.	Titles of the Statutes.
1 Ruffhead 201	2d Edward III. chap. 17.	"A Writ of Deceit shall be "maintainable in case of garnishment, in plea of land." *To be incorporated.*
Id. 202	4th Edward III. chap. 2.	"The authority of Justices "of Assize, Jail Delivery, "and of the Peace." Only those parts of this statute are in force, which are distinguished by the numbers 6 and 7.—*To be incorporated.*
Id. 203	4th Edward III. chap. 7.	"Executors shall have an "action of Trespass, for a "wrong done to their Testator."—*To be incorporated.*
Id. 210	5th Edward III. chap. 10.	"The punisnment of a juror that is ambidexter, and "taketh money."—*To be incorporated.*
Id. 224	14th Edward III. stat. 1. chap. 6.	"A record which is defective by misprision of a clerk, "shall be amended."—*To be incorporated.*
Id. 229	14th Edward III. stat. 1. chap. 16.	"Before what persons Nisi "Prius may be granted." That part only of this statute is in force which enacts, that "the Justices of Nisi Prius shall have power to give judgment on verdicts of assize, and upon nonsuits and defaults, and return the same to the court in Bank."—*To be incorporated.*
Id. 230	14th Edward III. stat. 1. chap. 18.	"If the tenant will vouch to "warranty a dead man, the "demandant may aver that "he is dead."—*To be incorporated.*
Id. 254	25th Edward III. stat. 2.	"Of those that be beyond "sea." Only that part of this statute is in force which is dis-

Book and Page.	Year and Reign.	Titles of the Statutes.
1 Ruffhead 254	25th Edward III. stat. 2.	tinguished by the number 5. *To be incorporated.*
Id. 262	25th Edward III. stat. 5. chap. 3.	"No Indictor shall be put "upon the inquest of the par- "ty indicted."—*To be incor- porated.*
Id. 263	25th Edward III. stat. 5. chap. 5.	"Executors of executors "shall have the benefit and "charge of the first Testa- "tor."—*To be incorporated.*
Id. 266	25th Edward III. stat. 5. chap. 16.	"The exception of non-te- "nure of parsel, shall not "abate the whole writ."—*To be incorporated.*
Id. 288	28th Edward III. chap. 13.	"The warranty of packing "of wool shall be put out— "An inquest shall be de me- "dietate linguæ, where an "alien is party." That part only of this sta- tute is in force, which gives an Inquest de Medietate Lin- guæ.—*Not to be incorporated.*
Id. 293	31st Edward III. stat. 1. chap. 11.	"To whom the Ordinary "may commit the administra- "tion of the goods of him that "dieth intestate—The bene- "fit and charge of an admi- "nistrator." This statute is in force, ex- cept that part which relates to expending money for the soul of the deceased.—*To be in- corporated.*
Id. 299	34th Edward III. chap. 1.	"What sort of persons shall "be Justices of Peace, and "what authority they shall "have." Those parts only of this sta- tute are in force which are dis- tinguished by the numbers 2, 3, 4, 5, 6 and 10.—*To be in- corporated.*

Book and Page.	Year and Reign.	Titles of the Statutes.
1 Ruffhead 301	34th Edward III. chap. 8.	"The penalty of a juror "taking reward to give his "verdict."—*To be incorporated.*
Id. 303	34th Edward III. chap. 16.	"Non-claim of fines shall "be hereafter no bar."—*To be incorporated.*
Id. 320	38th Edward III. stat. 1. chap. 12.	"The punishment of a Juror taking reward to give "verdict, and of Embracers."—*To be incorporated.*
Id. 332	50th Edward III. chap. 6.	"Fraudulent assurances of "land or goods, to deceive "creditors, shall be void."—*To be incorporated.*
Id. 336	1st Richard II. chap. 9.	"A Feoffment of Lands or "Gift of Goods for Maintenance, shall be void. An assize is maintainable against "the pernor of the profits of "land." This statute is in force, except such parts as are altered by the statutes of 4th of Henry 4th, chap. 7.—11th of Henry 6th, chap. 3.—4th of Henry 7th, chap. 24—and 27th of Henry 8th, chap. 10.—*To be incorporated.*
Id. 337	1st of Richard II. chap. 12.	"A prisoner by judgment "shall not be let at large—"Confession of a debt to the "king to delay another's execution." This statute is in force, except such parts as relate to confessions of debts to the king.—*To be incorporated.*
Id. 359	6th of Richard II. stat. 1. chap. 3.	"In which courts writs of "Nuisance called Vicontiels, "shall be pursued." So much of this statute is in force, as gives the Plaintiff

Book and Page.	Year and Reign.	Titles of the Statutes.
1 Ruffhead 359	6th of Richard II. stat. 1. chap. 3.	an election to have a writ of Nuisance, in nature of an assize.—*To be incorporated.*
Id. 371	8th of Richard II. chap. 4.	"The penalty if a Judge "or Clerk, make a false entry, "rase a Roll, or change a Ver- "dict."—*To be incorporated.*
Id. 372	9th of Richard II. chap. 3.	"A writ of error, or attaint, "maintainable by him in Re- "version." So much only of this statute is in force, as gives a writ of error to him in reversion.—*To be incorporated.*
Id. 390	13th Richard II. stat. 1. chap. 17.	"Where he in the reversion "may be received, in a suit "commenced against the par- "ticular tenant."
Id. 400	15th Richard II. chap. 2.	"The duty of Justices of "Peace when any forcible "entry is made into lands." So much only of this statute is in force, as relates to forcible entry and detainer, or either of them.—*To be incorporated.*
Id. 437	2d Henry IV. chap. 7.	"In what case the Plaintiff "shall not be nonsuit, if the "verdict pass against him." —*To be incorporated.*
Id. 446	4th Henry IV. chap. 7.	"The Disseisee shall have "an assize against the Dissei- "sor taking the profits."— *To be incorporated.*
Id. 460	5th Henry IV. chap. 14.	"Enrolling of Writs in the "Common Pleas, whereupon "Fines be levied." That part only of this statute is in force which directs, that all the Writs of covenant, and all other Writs whereupon Fines shall be levied, with

Book and Page.	Year and Reign.	Titles of the Statutes.
1 Ruffhead 460	5th Henry IV. chap. 14.	the Writs of dedimus potestatem, if any, with all knowledges and notes of the same, shall be enrolled in a roll, to be of record for ever.—*To be incorporated.*
Id. 483	1st Henry V. chap. 5.	"In which original writs "additions of the Defendant's "name shall be put." So much of this statute is in force as requires an addition of the Defendant's estate, or degree, or mystery, and of the county in which the Defendant is, or in which he is conversant.—*To be incorporated.*
Id. 513	9th Henry V. chap. 4.	"The Justices may amend "defaults in Records or Pro-"cess after judgment given." *To be incorporated.*
Id. 534	4th Henry VI. chap. 3.	"Justices in certain cases "may amend their records "according to former sta-"tutes."—*To be incorporated.*
Id. 545	8th Henry VI. chap. 9.	"The duty of Justices of "Peace, where land is enter-"ed upon or detained with "force."—*To be incorporated.*
Id. 550	8th Henry VI. chap. 12.	"No Judgment or Record "shall be reversed, for any "Writ, Process, &c. rased. "What defects in records "may be amended by the "Judges, and what not." Only the 1st and 2d sections of this statute are in force.—*To be incorporated.*
Id. 553	8th Henry VI. chap. 15.	"The Justices may in cer-"tain cases amend defaults in "Record."—*To be incorporated.*

Book and Page.	Year and Reign.	Titles of the Statutes.
1 Ruffhead 557	8th Henry VI. chap. 16.	"An Inquest shall be de "medietate linguæ, where an "alien is party."—*Not to be incorporated.*
Id. 569	11th Henry VI. chap. 2.	"The penalty where a She- "riff is named a Disseisor in "an assize."—*To be incorpo- rated.*
Id. 569	11th Henry VI. chap. 3.	"An Assize, &c. maintain- "able against the pernor of "the profits."—*To be incor- porated.*
Id. 571	11th Henry VI. chap. 5.	"The remedy where a te- "nant granteth over his estate, "taketh the profits, and com- "mitteth waste."—*To be in- corporated.*
2 Ruffhead 3	1st Richard III. chap. 7.	"Who shall be bound by a "fine levied before the Jus- "tices of the Common Pleas, "and Proclamations made "thereon." This statute is in force, ex- cept such parts as are altered by the statute of the 31st of Elizabeth, chap. 2d.—*To be incorporated.*
Id. 68	3d Henry VII. chap. 1.	"The authority of the "Court of Star-chamber, "where one Inquest shall "inquire of the concealment "of another. A coroner's "duty, after a murder com- "mitted. A Justice of Peace "shall certify his recogni- "zances, &c." Only those parts of this statute are in force, which are distinguished by the numbers from 6 to 19, both inclusive, and by the number 26.—*To be incorporated.*

Book and Page.	Year and Reign.	Titles of the Statutes.
2 Ruffhead 69	3d Henry VII. chap. 3.	"Justices of Peace may let "prisoners to bail. The She- "riff shall certify the names "of all his prisoners at the "Jail Delivery." Only that part of this statute is in force which is distinguished by the number 5. *To be incorporated.*
Id. 70	3d Henry VII. chap. 10.	"All Deeds of Gift made "to defraud Creditors, shall "be void."—*To be incorporated.*
Id. 72	3d Henry VII. chap. 10.	"Costs, &c. awarded to the "plaintiff, where the Defend- "ant sueth a Writ of Error." *To be incorporated.*
Id. 78	3d Henry VII. chap. 20.	"Actions popular, prose- "cuted by collusion, shall be "no bar to those which be pur- "sued with good faith.—*To be incorporated.*
Id. 79	4th Henry VII. chap. 24.	"How often a Fine levied "in the Common Pleas shall "be read and proclaimed, and "who then shall be bound "thereby."—*To be incorporated.*
Id. 85	11th Henry VII. chap. 12.	"A mean to help and speed "poor persons in their suits." *To be incorporated.*
Id. 89	11th Henry VII. chap. 20.	"Certain alienations made "by the wife, of the lands of "her deceased husband, shall "be void."—*To be incorporated.*
Id. 103	19th Henry VII. chap. 20.	"Writs of Error."—*To be incorporated.*
Id. 120	5th Henry VIII. chap. 6.	"An act concerning Sur- "geons, to be discharged of "Quests and other things." So much only of this sta-

Book and Page.	Year and Reign.	Titles of the Statutes.
2 Ruffhead 120	5th Henry VIII. chap. 6.	tute is in force, as discharges Surgeons from service on juries.—*To be incorporated.*
Id. 126	7th Henry VIII. chap. 4.	"An act concerning "Avowries for Rents and "Services." This statute is in force, except those parts that relate to Writs of quare impedit, and Advowsons.—*To be incorporated.*
Id. 137	21st Henry VIII. chap. 3.	"Plaintiffs in assize may "abridge their plaints."—*To be incorporated.*
Id. 138	21st Henry VIII. chap. 5.	"What Fees ought to be "taken for Probate of Testa- "ments." That part only of this statute is in force, which relates to the persons to whom administration is to be granted.—*To be incorporated.*
Id. 141	21st Henry VIII. chap. 7.	"Servants embezzling their "master's goods, to the value "of forty shillings, or about, "shall be punished as felons." This statute after having been repealed, was revived by the statute of 5th Eliz. chap. 10.—*To be incorporated.*
Id. 147	21st Henry VIII. chap. 15.	"Fermors shall enjoy their "leases against recoveries by "feigned titles."—*To be incorporated.*
Id. 173	23d Henry VIII. chap. 15.	"An act that the plaintiff "being nonsuited, shall yield "damages to the defendant, "in actions personal, by the "direction of the Justices." —*To be incorporated.*
Id. 176	24th Hen. VIII. chap. 8.	"An act where defendant "shall not recover any costs." —*Not to be incorporated.*

Book and Page.	Year and Reign.	Titles of the Statutes.
2 Ruffhead 226	27th Hen. VIII. chap. 10.	"An act converting Uses "and Wills." Only the 1, 2, 3, 4, 5, 6, 7, 9, and 10th sections of this statute are in force.—*To be incorporated.*
Id. 261	31st Henry VIII. chap. 1.	"For joint tenants and te- "nants in common."—*To be incorporated.*
Id. 277	32d Henry VIII. chap. 5.	"For the continuation of "debts upon execution."—*To be incorporated.*
Id. 291	32d Henry VIII. chap. 28.	"Lessees to enjoy the farm "against tenants in tail." This statute is in force, except the 4, 5, and 8th sections. —*To be incorporated.*
Id. 293	32d Henry VIII. chap. 30.	"Mispleadings—Jeofails." This statute is in force, except the 2d and 3d sections. *To be incorporated.*
Id. 294	32d Henry VIII. chap. 32.	"Joint tenants for term of "life or years."—*To be incorporated.*
Id. 294	32d Henry VIII. chap. 33.	"An act that wrongful "Disseisin is no Descent in "law."—*To be incorporated.*
Id. 294	32d Henry VIII. chap. 34.	"Concerning grantees of "Reversions to take advan- "tage of the conditions to be "performed by lessees." This statute is in force, except such parts as relate to the king of England and his grantees.—*To be incorporated.*
Id. 296	32d Henry VIII. chap. 36.	"For the exposition of "Fines." This statute is in force, except the 3d and 4th sections. *To be incorporated.*

Book and Page.	Year and Reign.	Titles of the Statutes.
2 Ruffhead 659	31st Elizabeth, chap. 2.	"be levied at the common "law."—*To be incorporated.*
Id. 668	31st Elizabeth, chap. 11.	"An act of Explanation or "Declaration of the statute of "Octavo Regis Henrici VI, "concerning forcible entries, "the indictments thereupon "found."—*To be incorporated.*
Id 712	43d Elizabeth, chap. 8.	"An act against fraudulent "administration of intestate's "goods."—*To be incorporated.*
3 Ruffhead 52	3d James I. chap. 8.	"An act to avoid unneces- "sary delays of Execution." —*To be incorporated.*
Id. 68	4th James I. chap. 3.	"An act to give costs to the "defendant, upon a nonsuit "of the plaintiff or verdict "against them."—*To be incorporated.*
Id. 99	21st James I. chap. 13.	"An act for the further re- "formation of Jeofails."— *To be incorporated.*
Id. 100	21st James I. chap. 15.	"An act to enable Judges "and Justices of the Peace to "give restitution of Posses- "sion in certain cases."—*To be incorporated.*
Id. 111	21st James I. chap. 24.	"An act for the relief of "creditors against such per- "sons as die in execution."— *To be incorporated.*
Id. 192	12th Charles II. chap. 24.	"An act for taking away "the court of Wards and Li- "veries, and Tenures by Ca- "pite, and by Knight's Service "and Purveyance, and for "settling a revenue on his "Majesty in lieu thereof."— Only the 8th and 9th sections of this statute are in force.—*To be incorporated.*

Book and Page.	Year and Reign.	Titles of the Statutes.
3 Ruffhead 215	12th Charles II. stat. 2. chap. 2.	"An act for the prevention "of vexations and oppres- "sions by arrests, and of de- "lays in suits of law." This statute is in force, except certain parts which have a local object, and are therefore inapplicable to this Commonwealth, and certain other parts, which are altered by our acts of the assembly, or the practice of our courts.—*To be incorporated.*
Id. 293	16th and 17th Charles II. chap. 8.	"An act to prevent arrests "of judgment, and superseding "executions." This statute is in force, subject to the same exceptions as were mentioned with relation to the statute of 12th Charles II. stat. 2d, chap. 2.—*To be incorporated.*
Id. 299	17th Charles II. chap. 8.	"An act for avoiding un- "necessary suits and delays." —*To be incorporated.*
Id. 313	19th Charles II. chap. 6.	"An act for redress of in- "conveniences by want of "proof of the deceases of per- "sons beyond the seas, or ab- "senting themselves, upon "whose lives estates do de- "pend."—*To be incorporated.*
Id. 357	22d and 23d Charles II. chap. 9.	"An act for laying impo- "sitions on proceedings at "law." All that is unexpired of this statute, that is to say the 136th section "for prevention of trivial and vexatious suits in law," is in force.—*To be incorporated.*
Id. 394	30th Charles II. chap. 7.	"An act to enable creditors "to recover their debts of the

Book and Page.	Year and Reign.	Titles of the Statutes.
3 Ruffhead 394	30th Charles II. chap. 7.	"executors and administrators" "tors of executors in their "own wrong."—*To be incorporated.*
Id. 527	4th and 5th William & Mary, chap. 21.	"An act for delivering declarations to prisoners."—*To be incorporated.*
Id. 642	8th and 9th William III. chap. 11.	"An act for the better preventing frivolous and vexatious suits."—*To be incorporated.*
Id. 697	9th and 10th William III. chap. 15.	"An act for determining "differences by arbitration."—*To be incorporated.*
4 Ruffhead 14	10th and 11th William III. chap. 16.	"An act to enable posthumous children to take estates "as if born in their father's "life time."—*To be incorporated.*
Id. 43	11th and 12th William III. chap. 6.	"An act to enable his Majesty's natural born subjects, "to inherit the estates of their "ancestors either lineal or "collateral, notwithstanding "their father or mother were "aliens."—*To be incorporated.*
Id. 180	3d & 4th Anne, chap. 9.	"An act for giving like "remedy upon promissory "notes, as is now used upon "bills of exchange, and for "the better payment of inland "bills of exchange." The 1st, 3d, 4th and 8th sections of this statutes are in force.—*To be incorporated.*
Id. 205	4th Anne, chap. 16.	"An act for the amendment "of the law, and the better "advancement of justice." The first 13 sections, and the 20th and 27th sections of this statute are in force.—*To be incorporated.*

Book and Page.	Year and Reign.	Titles of the Statutes.
5Ruffhead 201	5th George I.	"An act for the amendment "of writs of error, and for the "preventing the arresting or "reversing of judgments af- "ter verdict."—*To be incorporated.*
6Ruffhead 167	7th George II. chap. 20.	"An act for the more easy "redemption and foreclosure "of mortgages." The 1st and 2d sections of this statute are in force.—*To be incorporated.*
Id. 296	11th George II. chap. 19.	"An act for the more effec- "tual securing the payment "of rents, and preventing "frauds by tenants." The 14th and 15th sections of this statute are in force.—*To be incorporated.*

There are several statutes, called statutes of *Mortmain*, one of which ("the statute de Religiosis") was passed in the 7th year of Edward I. statute the 2d; another in the 13th year of Edward I. chap. 32; another in the 15th year of Richard II. chap. 5; and another in the 23d year of Henry VIII. chap. 10. These statutes are in part inapplicable to this country, and in part applicable, and in force. They are so far in force, that all consequences, either by deed or will, of lands, tenements or hereditaments, made to a body corporate, or for the use of a body corporate, are void, unless sanctioned by charter or act of assembly. So also are all such conveyances void, made either to an individual, or to any number of persons associated, but not incorporated, if the said conveyances are for uses or purposes of a *superstitious* nature, and not calculated to promote objects of charity or utility.—*To be incorporated.*

WM. TILGHMAN,
J. YEATES,
THOMAS SMITH,
H. H. BRACKENRIDGE.

December 14, 1808.

District Court of the United States.

AT NORFOLK, DECEMBER, 1808.

The United States *v.* Hipkin and others. *In debt.*

THIS was an action of debt brought to recover the sum of 1200 dollars, the penalty of the bond given by the defendants for the enrolment of the schooner *Caroline*.

The declaration set out the bond and the conditions, among which was the following, "and if the said schooner *Caroline* shall not proceed on a voyage to any foreign port or place without being duly licensed according to law for carrying on the cod or whale fishery, and without obtaining a permit to touch and trade at a foreign port or place during such voyage, or without previously surrendering the said certificate of enrolment to the collector of the district from which such foreign voyage shall be proposed to be made then," &c. This condition it was avetred had been broken in this, "that the said schooner *Caroline* on the ——— day of ——— 1808, proceeded on a foreign voyage, to wit: on a voyage to *Antigua*, which was a foreign place, without being duly licensed according to law for carrying on the cod or whale fishery, and without obtaining a permit to touch and trade at a foreign port or place during such voyage, and without previously surrendering the said certificate of enrolment to the collector of the district from which such foreign voyage was proposed to be made, viz. to the collector of the port of *Norfolk* and *Portsmouth*;" by reason whereof the said bond was forfeited and its penalty demandable.

To this declaration there was a general demurrer, in which the *United States* having joined, the cause came on to be argued by *Hay*, district attorney for the plaintiffs, and by *Taylor* and *Tazewell* for the defendants.

For the defendants it was contended, that the condition above stated for a breach of which alone this action was

brought, was 1st, a condition not authorized by the statute; 2d, a condition contrary to the express provisions of the law which permitted and required the bond; 3d, a condition hostile to the genius and spirit of all our laws upon the subject of navigation and commerce. And if so, that the condition was void, and no action could be maintained for a breach of it.

In support of these propositions it was said,

1st, That the only law, which permitted or required any bond to be given for the enrolment of a vessel, was the act of congress passed on the 18th of *February* 1793, entitled, "An act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same," 2 *vol. Laws United States* 168. That this statute contained in itself no direction as to the form or contents of a bond to be given for the enrolment of a vessel, and indeed contained no direct declaration that any bond should be given at all. The second section of that law declares, that " in order for the enrolment of any ship or vessel, she shall possess the same qualifications, and the same requisites in all respects shall be complied with as are made necessary for registering ships or vessels, by the act entitled, 'An act concerning the registering and recording of ships or vessels,' and the same duties and authorities are hereby given and imposed on all officers respectively, in relation to such enrolments, and the same proceedings shall be had in similar cases touching such enrolments."

This law having directed the same requisites in all respects to be complied with, and the same proceedings to be had in the case of an enrolment, as had been required in the case of a register by the act therein referred to, although the act concerning the enrolling of vessels contained in itself no specific direction requiring a bond to be taken, or prescribing the form of such bond, yet as the act concerning the registering of vessels did make the execution of a bond a requisite to be complied with and proceeding to be had as in the case of a register; a similar requisite and proceeding was exacted in the case of an enrolment. Expunge this statute from our code and *no bond* can be required of an enrolled vessel. Admit this statute

and the *only bond* which it requires is a similar bond to that required in the case of a register.

The "act concerning the registering and recording ships or vessels," which is referred to as above, in its seventh section declares by whom, to whom, in what penalty, and with what condition a bond for obtaining a register shall be executed. See *2d vol. Laws United States* 137.* Compare this bond with that section, and you will discover their precise concordance, until you come to the condition, which is the foundation of the present action, and which is no where to be found in the law. Nay, it would be strange indeed, if we expected to find any such condition in a bond of registry, remembering, as we must do, that the sole inducement for taking a register, is to qualify the vessel which receives it, to proceed on a foreign voyage. This condition, therefore, is not authorized by law.

4. To support the third position, viz. that such a condition was hostile to the genius and spirit of all our laws upon the subject of navigation and commerce, the defendant's council entered into a critical and historical examination of all these laws. The *characters* of the various vessels engaged in the trade of the *United States* were stated, and they were divided

* By the 8th section of the act of congress, concerning the enrolling vessels, it is provided "that if any ship or vessel enrolled or licensed as aforesaid, shall proceed on a foreign voyage without first giving up her enrolment and license to the collector of the district, comprehending the port from which she is about to proceed on such foreign voyage, and being duly registered by such collector, every such ship or vessel, together with her tackle, apparel and furniture, and the goods, wares and merchandise so imported therein, shall be liable to seizure and forfeiture." See *2d vol. Acts of the United States, p.* 174. By this bond a penalty of 1200 dollars is imposed by the collector for the performance of the very same act. To support this action, then it must be contended, either that the collector, by his penalty, has repealed that imposed by the law, or that the offending individual is subject to two penalties for the same act, one imposed by the collector, the other by the law. But as both these propositions would bestow high legislative authority on a very humble ministerial officer of the executive, it is believed that neither can be contended for, but that it must be admitted that this condition is *contrary* to the express provisions of the statute, which imposes another and a different punishment for this act.

into the following classes, to wit: foreign, recorded, registered, enrolled, and licensed vessels. The *privileges* and *duties* enjoyed by, and imposed upon each of these classes of vessels, were also detailed, and supported by a reference to the various statutes imposing duties on tonage and goods, and regulating the collection of duties. It was then argued, that congress, having distinguished these vessels as above, and having endowed them with *different* privileges, and imposed upon them *different* duties, it became necessary to establish some standard whereby the one class might always be distinguished from the other by those who were authorized to exact the performance of these duties, or permitted to grant these privileges. Hence certificates of record, registry, and enrolment were introduced as constituting the sole evidence, and fixing the standard whereby the different characters of vessels were to be ascertained. But as these documents might be missed, and others, not entitled to the privileges which followed their possession, might enjoy such privileges by obtaining the documents themselves; to guard against such frauds, bonds were required to be executed by those who first obtained such documents: The sole object of these bonds being to preserve *American* documents in *American* hands, the condition of such bonds attained this object, and none other. A reference to the seventh section of the act, before stated, *2d vol. Laws United States p.* 137. would establish this position. There it would be found, that the only conditions annexed to a bond of register referred to the proper use of her documents, and similar proceedings were directed to be had in the case of enrolled vessels. These being the only kinds of *American* vessels which were capable of engaging in foreign trade, and therefore of misusing such documents, the bonds for these referred to this object only. As to licensed vessels, they being under twenty tons, and incapable of engaging in foreign trade, no misuse of their documents could be had to the detriment of the revenue; and therefore, no such bonds were exacted from them as were requested from the others. Frauds against the public revenue by smuggling, being the only mischief which such vessels were

capable of committing, the condition of the execution by those concerned in a licensed vessel referred to this object, and to none other. Hence it was concluded, that the insertion of a condition, as was found in the present bond, was hostile to the spirit of all our laws upon the subject of navigation and commerce.

Having established these points, the counsel for the defendants observed, that no argument would be used to prove that such a condition not authorized by the expressed will of the legislature and hostile to the spirit of all our laws upon this subject, was void in itself. This point would be taken as granted, until it should be denied by the counsel for the *United States*. If the condition was void, no action could be maintained for a breach of a void condition, and therefore as the only breach assigned for the forfeiture of the bond in question was a breach of this condition, the present action could not be maintained, and the demurrer must be established.

The defendants' counsel concluded the argument by showing the absurd effects and tyrannical consequences which would result from permitting public officers to insert in bonds which they have authority to exact from individuals any condition which they thought proper, and which the law neither required nor permitted.

The argument on the part of the defendants being concluded, *Hay*, district attorney, said, that he should not pretend to deny the truth of the concluding argument which had been urged by the defendants, but would admit that a condition in a bond taken by a public officer, which was not authorized by the law which required the bond, was void, and that no action could be maintained for the breach of such a condition. Whether the condition in the present bond was of this description or not he would not pretend to say at present. If the laws referred to by the defendants' counsel were the only laws upon the subject, the argument which had been urged was unanswerable. But the bond in question had been taken in pursuance of instructions received by all the collectors in the *United States*, from the treasury department in the year 1793, shortly after the

enaction of the laws which had been referred to by the counsel for the defendants. Supposing that the officer of that department was perfectly acquainted with the law, under which he was acting when these instructions were given, and indeed being convinced of this, not only from the general character of the department itself, but from an universal acquiescence in the form of the bond by every individual who had executed such a bond for 15 years past, he had not deemed it necessary to examine the form of the bond and to compare it with the law which required it upon the present occasion.

He hoped the court would allow him some time not only to examine the various acts of congress upon this subject himself, but to consult with the officers of the customs, whose duty it was more particularly to attend to such matters, in order to inform himself if there were any other provision in the laws which had been cited, or any other statutes which applied to this case. The judge granted this application; and the cause was continued for several days.

On *Monday* last, Mr. *Hay* stated to the court, that he had not only made every examination into the subject which he could, but had also applied to the officers of the customs for their aid in this research. It had been in vain, however; for no other laws could be found applicable to the case, but those to which the defendants' counsel had referred.

The positions for which they had contended under those laws he could not deny, and therefore with the consent of the defendants' counsel he should dismiss the cause. This was done accordingly; and at the same time several other causes which had been instituted on similar bonds, were also dismissed.

Commonwealth of Pennsylvania.

On a Habeas Corpus to the Keeper of the Prison of Philadelphia, to produce the Body of *Hippolyte Dumas*, &c.

IT appears that *Hippolyte Dumas* was an ensign on board the *French* ship *Alexander*, which was captured by the *British* off *St. Domingo* and carried to *Jamaica*. He was there discharged on his parol, and came to the *United States*, where he applied to the consul general of *France* for support as a *French* officer, and for a passage to *France*. The consul assisted him with money and promised him a passage. Some time after, the captain and crew of the *French* frigate *La Valeureuse*, which had come to the port of *Philadelphia* in distress, and been condemned as unfit for the sea, were about to be sent to *France*, in the *American* ship *Washington*, commanded by the *American* captain *George Morse*, chartered by the consul general for that purpose. The name of *Dumas* was enrolled among the passengers. The ship sailed to *New Castle*, in the state of *Delaware*, in the prosecution of her voyage, and stopt there. *Dumas* went to *New Castle* by land, and having arrived there, did not go on board the *Washington* but went to *Baltimore*, from whence he returned to *Philadelphia*. The consul general claimed him as a deserter from the navy of his imperial and royal majesty the emperor of *France* and king of *Italy*, and upon an affidavit made by him, alderman *Shoemaker* committed *Dumas* to prison, there to be kept till an opportunity should offer of sending him to *France*. Since that, the consul general has brought a civil action against *Dumas* for the recovery of the money advanced to him. We thank the learned counsel, who by their researches and arguments have thrown light on this important subject.

It is much to be wished that cases of this nature were regulated by a law of the *United States*. There certainly is great

convenience in the delivering up of deserters, who *in our ports* leave the ships of those nations, who on their parts are willing to give up deserters from our vessels in similar cases; and great inconvenience may result from its not being done. But without any law of the *United States* or of this state to warrant it, we look upon the interference of a state judge in the delivering up of a foreign deserter, as a matter which requires very serious consideration. When the question fairly occurs, it shall receive all the consideration it merits: at present we mean not to touch it, because the particular circumstances of *Dumas's* case, put him in a different situation from that of an officer who, being on board a foreign ship of war which has come to our ports, deserts from her. Necessity may in that case authorize strong measures, because if the ship is deserted by a considerable number of her crew, she cannot be navigated. *Dumas* came to the *United States* unconnected with any *French* vessel; he required a passage home from the consul of his nation; he was to have had that passage in an *American* vessel; and the only circumstance which places him at all in the light of a deserter, is that of his name being enrolled among that body of men, who, although sailing in an *American* vessel, were by the military law of *France* subject to the command of the captain of the *Valeureuse*, he being the superior officer. The consul general having brought a suit against him for the recovery of the money advanced, seems to countenance the idea of his not being a deserter; for if he is to be delivered up as such, he ought not at the same time to be responsible in a civil action. Under these circumstances, we are of opinion that even supposing the laws of nations required of the *United States*, to give up generally those seamen who desert from foreign ships of war within our harbours, and that alderman *Shoemaker* was authorized to carry this law into effect (points concerning which we give no opinion) still this case is of so special a nature as to form an exception to the general rule.

We therefore order that *Dumas* be discharged from confinement under the warrant of alderman *Shoemaker*.

[Delivered by Chief Justice *Tilghman* and Judge *Smith*, *Monday*, 20th *July*, 1807.]

Pennsylvania—Court of Common Pleas.

ERIE COUNTY, 1807.

The President, Managers and Company of the Erie and Waterford Turnpike Road *v.* John Cochran, Esq.

TURNPIKE COMPANY. TRESPASS. The Legislature of Pennsylvania may prescribe the manner in which land may be taken by an incorporated Turnpike Company, for the purpose of making a road. If the Company offer to make compensation to the owner of the land, agreeably to the law, which he refuses, and obstructs that part of the road which passes through his land, the Company may maintain trespass against him.

THIS was an action of trespass for entering on and obstructing the passage of the route or track laid out and opened by the company, for the turnpike road, in *Millcreek* township, in *Erie* county, by building two fences across the road, and falling several trees on and across the same; the defendant plead not guilty, with leave to give the special matter in evidence.

It appeared in evidence, that the turnpike company having surveyed and marked out the track or route of the road from *Erie* to *Waterford*, had contracted for the opening and completing that part of the road, which passes through the defendant's land, part whereof passes through one of the defendant's fields about the distance of eighty perches; that the contractor was bound, by articles of agreement, to make a good and substantial fence on each side of the road, where it passed through the said field; which appeared to have been done, in the course of last fall, excepting (as some witnesses testify) that between some of the under rails and the ground, too large a vacant space was left; and in a few instances, some rails near the under rail were somewhat crooked; and in one instance, a rail had been split and left in the fence, the one part lapping over the other, and supported in the centre by a small block or chunk; that the

fence was otherwise well made, being eight rails high; that said fence was not begun till after harvest; that in hauling the rails, until the fence was put up, the gap through which they entered the field to haul the rails and to work at the road, was regularly closed every night, with the exception of one night, which appeared to have happened by accident; that no notice was ever given by the defendant to the plaintiffs of any alleged insufficiency of the fence. The defendant had, in the course of the summer, proposed to sell to the plaintiffs, that part of his land necessary to be occupied for the road, but had demanded a price which they deemed extravagant, viz. 20 dollars per acre for the whole, as well wood land as cleared land, except a small part that had been previously occupied by a county road. The plaintiffs proposed to him, to proceed in the manner pointed out by the 10th* section of the law, by petition to the court, who would appoint six *disinterested* persons to view and ascertain the sum which he ought to receive, and which they would immediately pay. This he refused; saying, no person should fix the value of his property, and until the company paid him what he *pleased* to ask, they should not make the road, and he would shut it as fast as they should attempt to open it.† It appeared, that the defendant was the only person from *Erie* to *Waterford* that asked any compensation for their land through which the turnpike road passed; and that he was greatly benefited by the road, having a grist and saw mill almost adjoining the road.

* [By the act of the 6th *April* 1802. § xiv. it is provided, that in cases where a public road is carried through any land to the injury of the owner, he may, within one year, but not afterwards, make a representation by petition to the court of quarter sessions. The court then appoints six disinterested persons to ascertain the damage, and upon their report being approved by the court, the amount ascertained is paid by the treasurer of the county.

The private act above referred to is not to be procured in *Baltimore*, but it is presumed to be conformable to this public act.]

† In *November* last the trespass charged was committed; which it was estimated would cost two dollars and fifty cents to remove.

William Wallace and *Alexander W. Foster*, esqrs. were concerned as counsel for the plaintiffs; and *Patrick Farrelly*, esq. counsel for the defendant.

Mr. *Wallace* opened the cause by giving a brief detail of the facts, which he expected would be given in evidence, and of the principles of law which would arise in the cause.

Mr. *Farrelly*, after having opened the cause on the part of the defendant, and concluded the testimony, contended,

1st, That there is a controlling power in courts of justice, to set aside any law contrary to the constitution.

2d, That by the constitution no property can be taken, but for public use; that this was for private use; as some particular case might occur of an individual too poor to pay the toll, and therefore he would not have a right to pass. This exception would therefore take away from the generality the public right, and would prove it to be for private use only, as any thing for public use must be for the use of the public.

3d, Until compensation was made by the company, they had no right to enter; they could acquire no right but by purchase; and he had the same right to fix the value on his own property, as if contracting with an individual.

4th, The act is silent as to damages for land used for the route of the turnpike; it only applies to the case of damages for taking materials. This case must rest upon the constitution. No remedy for judge *Cochran*, if they could not agree on the price, but for him to bring a suit in court, for the value of his land.

Mr. *Foster* began by observing the great evils that arise to the public, when men, who from wealth, talents or official situations, have gained an influence in society, and who, instead of directing that influence to beneficial purposes, adopt erroneous principles and practices. That the injuries such men do, go beyond themselves; for their example is too apt to influence the conduct of others, who have not the same means of information; or who rely implicitly on their judgment; that an opposition had been raised by one or two individuals, to the payment of their shares, which had extended to others; and,

unfortunately, those persons suffered who had been persuaded to refuse the payment of their shares; while those who had urged them on to opposition, had settled their own causes, and were afraid to bring them to trial. In this case, it was more fortunate than might have been expected, and was much to the honour of those owning lands on the turnpike, that the example of the defendant had produced no opposition by others.

As to the first point made by the defendant's counsel, Mr. *Foster* said, he was happy to find the gentleman adopt sentiments so correct. He admitted the constitution to be the supreme law of the land, and believed it to be paramount to all acts of the legislature, otherwise it would be a dead letter. He believed it to be "the palladium of our liberties," and he was willing to meet him on constitutional grounds, and if the constitution should prove that the defendant might hold his property from being taken and applied to a great public undertaking, honourable to those who planned and supported it, and on which the future prosperity of this country depends, until he was paid whatever price he might demand for it; then he would agree with a meeting, of which the defendant had once been a member, that the constitution was not as perfect as it might be. Here Mr. *Foster* was interrupted by Mr. *Farrelly*, who said, he had only used the argument as the opinion of his client. Mr. *Foster* replied, he was happy to find so correct an opinion had gone beyond the counsel to the defendant.

Secondly, Mr. *Foster* complimented Mr. *Farrelly* on the greatness of the discovery, that "*whatever was for the public use, must be for the use of the public.*" That the case put of a person unable to pay, not being able to travel the road, made no more difference, than if he had been prevented by sickness or intoxication; none of these disabilities made the road a private one. If the road was private and for the exclusive use of the company, they would have a right to prevent any person whatever from travelling it: whereas, they can prevent no person from travelling, who will comply with the act, and pay a moderate toll, to compensate for the great expense accrued in making the road. That the argument, if correct, would put

it out of the power of the legislature to have an artificial road made, unless individuals would make it without any remuneration for their expenditures.

As to the third point, the constitution fixed the principle, that the property of an individual might be taken for public use; that no mode being pointed out by the constitution, to ascertain the value, it must be ascertained and regulated by the legislature. But the principle contended for, would be to make a man a judge of his own cause, which is against the principles of eternal justice, or to allow him to retain his property, however necessary for the public good; which cannot be so in a state of society, where no man liveth to himself, but is a member of the great family of the state, and must yield up private convenience for the public good; for which, he is to receive a just compensation, but of which he is not to be judge, in his own case.

As to the fourth and last point, the law clearly provides, that that if any person considers himself damaged, by the road going through his land, he may apply to the court, who will appoint six disinterested persons to ascertain the amount which is to be paid by the company. As to the remedy pointed out by the court, it would be nugatory. There is no form of action by which such a suit could be brought. And as the counsel urges that no right could exist in the company until compensation should be made, which in this case could not be done, till a suit at law was determined; this the defendant might not commence for ten years or fifty years; by which means he had it effectually in his power to defeat the road from being ever made, until his avarice should be gratified, or his perverseness removed.

That, therefore, the defandant was clearly a trespasser; that if the jury believed the trespass wilful and malicious, to harass the company in their operations in endeavouring to promote the great essential interests of the country, they ought to find damages not only to compensate the plaintiffs, but also to punish the defendant. That the court would then not only be a court of justice, but a school of morals.

The court in the charge to the jury stated, that the constitution being silent as to the mode in which individuals, whose property was taken for public use, should be compensated, the legislature had the power to prescribe such one as should be just: that the mode directed in this case was an equitable one, and clearly within their powers; and as to the form of suit, that the turnpike company had such a possession of and interest in the road, as enabled them to support an action of trespass against any person who should obstruct it; otherwise the power given them, and the obligation they were under to keep the road for ever in repair, would be nugatory, and could never be carried into effect.

The jury awarded twenty two dollars fifty cents damages, and costs of suit.

Georgia: Liberty County Superior Court.

NOVEMBER TERM, 1808.

Paul Grimball *v.* Francis Ross. *In Equity.*

CHARLTON, Judge. A motion has been made by Mr. *Noel* and Mr. *Berrien* to bring on the trial of this case upon these two material grounds.

1st, Because the act entitled "An act to alleviate the condition of debtors, and afford them a temporary relief," does not prevent the trial of equity cases, our statutes having created a distinction between equity and civil cases; and if this ground should not be sustained, it is still contended that this equity case can be tried.

2d, Because the "Act to alleviate the condition of debtors and to afford them a temporary relief" is unconstitutional.

The counsel for the complainant, as well as Mr. *Harris*, who opposed the motion, have supported their respective arguments with learning and ability; and the ample information elicited from the discussion, has enabled me in the course of

the *few hours* allowed for the daily adjournment of the court, to arrange my ideas, and to give some kind of method to the opinion which I am now about to deliver. I shall take the liberty of reversing the order in which the grounds for the motion have been stated: because, if the act is unconstitutional, it will be perfectly unnecessary to advert to the distinction between an EQUITY and a CIVIL case.

First: Is the act of the general assembly *unconstitutional?*

The power which the *judicial department* claims of deciding on the constitutionality of laws, is a power inseparable from the organization of that department. It is a power which results from the peculiar construction of the federal and state compacts: without it, all the horrors of *legislative omnipotence* would instantly stare us in the face, followed by a prostration of those wise checks a legitimate exercise of that power imposes upon all wicked usurpations on the sacred rights of the people.

In *England* they have no constitution; hence their parliament possesses omnipotent powers. *Englishmen* call MAGNA CHARTA, their bill of RIGHTS, and ACT of SETTLEMENT, component parts of the *British* constitution. But we all know that the people had no agency in any of those measures, consequently they were acts of an omnipotent legislature or of an oligarchy assuming and exercising the sovereign authority.

A constitution stands upon a different basis. It emanates directly from the *will* of the people, in whom from the very nature of things the sovereign power necessarily resides. As soon as the people have given existence to this constitution, it becomes the supreme law of the nation or the state; it is paramount to all other authority; and that mighty fiat, and that fiat only, which gave it life, can announce its destruction.

These are the political tenets which cling to, and are dear to the hearts of all TRUE AMERICANS. They are tenets dear to *Americans*, because who can oppress or can be oppressed, under the benign and energetic influence of a written constitution, which designates and guarantees all the rights of man, and which raises up every arm in defence of them.

From passion, from unprincipled ambition, from the illusions of ignorance, from the ebullitions of political acrimony or misguided zeal, it is very easy to perceive the possibility of an unconstitutional act of the legislature. What then is the remedy? A recourse to the people's vengeance. Must the people be called upon to defend in their aggregate capacity, that compact and those privileges which flowed directly from the source of their volition? If this is the remedy, our boasted republicanism is nothing more than systematical anarchy, and it would therefore be better for us to repose on the thorny protection of an absolute monarch. Is the remedy found in a patient endurance of the evil, until succeeding legislatures think proper to repeal the unconstitutional edict? This would be worse than an appeal to popular insurrection; for it is founded on the preposterous expectation, that the same hand which cruelly and deliberately inflicted the wound, will be benevolently extended to heal it: it is worse than popular insurrection, because it presupposes an acquiescense in an outrage upon constitutional rights longer than ought to be borne by *American citizens*. The remedy can only be found then in the wisdom and independency of the judicial department. *Here*, the passions, the feelings, and the interests which may and frequently do sway deliberative bodies, cannot be found. This department is aided by all the lights which cool and dispassionate investigation can afford, and it is governed by maxims of jurisprudence which, *apertis foribus*, offer a secure asylum to every citizen whose weakness or injuries solicit admission and protection. This department cannot deviate from those fixed principles which, for ages, the approbation of mankind has stamped with the seals of truth and authority. In this respect the judicial is unlike the legislative department, whose functions are regulated by the caprices of an arbitrary discretion. Under thi view of the judicial department, it is surely the best, the safest, and in our republic, can be the only mediator between a citizen and an unconstitutional act of the legislature.

The objection, that the judicial department cannot decide on the constitutionality of an act of the legislature, because the

judges are elected by the legislature, and that therefore the *creature* cannot be greater than the *creator*, is a mode of reasoning abhorred by the constitution. It is true, that the judges are elected by the legislature, but when elected they constitute a department coequal, and coordinate with the legislature. What other inference can be deduced from the distinctiveness established in the constitutional declaration? Article 1. sect. 1. Precedents are not wanting either in the federal or state jurisdictions, to prove that the judicial department possesses and has actually exercised the power of deciding on the constitutionality of legislative acts. I have here no access to books, and therefore will not venture to state from recollection the principles upon which each case was decided. My mind is satisfied with throwing out these general, and perhaps they may be called desultory observations, which convey on this point my opinion as strongly as I can express it. But if the judicial department can declare an act unconstitutional, in what manner ought a power of such magnitude to be exercised? I think it ought only to be exercised where the act is directly in the teeth of the constitutional provision: and I agree with what fell from Mr. *Harris*, that no nice doctrines, no critical exposition of words, no abstract rules of interpretation, such as may fit the elucidation of principles in a legal contest between individuals, can or rather ought to be resorted to in deciding on the constitutional operation of a statute. The violation of a constitutional right ought to be as obvious to the comprehension of every one as an axiomatic truth: as that the parts are equal to the whole.

I shall endeavour to illustrate this: The 1st sect. of the 2d article of the constitution declares, that the "executive shall be vested in the governor." Now, if the legislature was to vest the executive power in a "*standing committee of the house of representatives*," every mind would at once perceive the unconstitutionality of the statute. In such a case as that, therefore, the judicial department would be authorized without hesitation to declare the act unconstitutional. But where it remains *doubtful* whether the legislature have or have not trespassed upon

the constitution, the conflict ought to be avoided, because there is a possibility in such a case of the constitution being on the side of the legislature.

If this act therefore involves principles as evidently unconstitutional as the case I have stated, I shall say so, and at the same time feel perfectly tranquil under the clamour or the consequences which may result from such a decision. If on the other hand, the 4th section of this act, or the parts of it which have been particularly alluded to, can be placed in alliance with the constitution; or if it becomes a matter of difficult solution whether that section is or is not reconcilable with the constitution, I shall then feel much gratification in escaping from a combat with legislative authority. This section of the act declares "that neither of the aforesaid courts shall issue out any civil process or try any *civil case*, except for the trial of the right of property, real and personal," &c. This act expires on the 25th of *December* next. Mr. *Berrien* says, that this section of the act is unconstitutional, because it inhibits a citizen from taking advantage of the trial by jury under the usual and regular administration of justice, and because it interferes with the sittings of the superior court, which are directed by the constitution to be held twice every year in each county.

Mr. *Noel* says, that this section of the act, or the whole of the act is unconstitutional, because it impairs the obligation of contracts.

The first objection may, I think, be answered very laconically. The trial by jury is not taken away by a bare postponement of the trial of cases in which the interposition of a jury may be required. The positive and unqualified deprivation of a right, is surely different from the temporary delay of the enjoyment of that right. A denial of a right, legally speaking, is an unlimited prohibition of its enjoyment. If the right is not annihilated it exists. Now in the case under discussion, there is no express inhibition of the trial by jury, and therefore agreeably to the positions I have before suggested, if the denial of the right of trial by jury is not the clear and explicit

language of the act, the judicial department will not resort to finespun deductions to find out the violation of that, or any other constitutional franchise. As a conclusion to this objection, I am then of opinion, that so far from taking away the right of the trial by jury, this act acknowledges the unimpaired existence of that right, and only affects the trial of the cases for a definite period.

The second objection may have its weight in the opinion of the learned gentleman who urged it, but with me it has none.

The constitution merely declares, that "the superior and inferior courts shall sit in each county twice in every year, at such stated times as the legislature shall appoint." *1st sect. 3d art.* This act does not interfere with the *sittings* of the superior court in each county every year. If the legislature had declared that the superior court should *not* sit at all for the term of one year, or that its sittings should be held only *once* in each county for the term of a year, under such a prohibition the act would be pronounced unconstitutional: but how can the idea of the *business* which is properly cognizable in the superior court, be identified with the sittings of that court? To me there appears as wide a difference between the sitting of the court (which the constitution must mean an opening of the court) as there is between the action of *trover*, and the daily adjourning proclamation of the sheriff. The constitution is silent as to the manner in which the business of the court shall be managed and conducted, the process that shall be issued, the service of that process, or the periods at which cases shall be tried. All this is left to legislative wisdom; and however much I may doubt and deny the *policy*, the *necessity*, or the *justice*, in interfering with or prescribing distant periods for the *trial* of actions, under any combination of circumstances, yet I am compelled by official duty to say, that the discretionary exercise of this power is not meddled with by the constitution, and that it is therefore a portion of that *residuum* of authority retained by the people, and may be exercised by the legislature.

Again: It is said this act impairs the obligation of contracts.

The tenth section of the first article of the federal constitution declares, that no state shall pass a law impairing the obligation of contracts. What is meant by the terms "impairing the obligation of contracts?" Any measure, I should suppose, which lessens the value of contracts, that gives them a diminished dignity, takes from them any of the properties of contracts, or which devests them of that priority of lien, obligation, or recovery, which they would otherwise possess. This impairing of contracts must mean their partial rescindment by legislative authority. This act therefore, as it does not innovate upon the obligation of contracts, either by a partial rescindment, by destroying any of the properties of contracts, or by diverting the usual operation of the lien, cannot be said to impair the obligation of contracts. The usual periods at which contracts were heretofore enforced by action are protracted: the facilities of recovery have been suspended. But does this impair the obligation of contracts? Certainly not. Their *obligation* remains entire, and a bond or covenant is as valuable, and on the score of obligation, is as operative now, as before the passing of the act.

Under these impressions of the objections I have thus noticed, I am therefore of opinion (bottoming my opinion upon those specific objections) that this *act is constitutional.*

2dly, The second ground of the motion now demands investigation; and the question it involves is, whether under our system of laws, an EQUITY CASE can be denominated a CIVIL CASE.

There can be but this division of cases: 1st, Criminal; 2d, Civil.

Criminal cases are those which involve a wrong, or injury done to the republic, for the punishment of which the offender is prosecuted in the name of the whole people.

Civil cases are those which involve disputes or contests between man and man, and which can only terminate in the adjustment of the rights of plaintiffs and defendants.

It is said however that a critical examination and collation of our statutes establish another class of cases, to wit, equity cases, as contradistinguished to criminal and civil cases. I have taken infinite pains to trace in our laws the lines of distinction between an equity and a civil case; but without adopting implicitly the inferences of the gentleman who contends for this distinction, I can see nothing in the plain letter of the law which creates it.

The argument I think stands fairly thus. The constitution gives to the superior court, exclusive and final jurisdiction in all criminal cases, and in cases respecting the titles to land: *article* 3. *section* 1.

Here then is one distinction between criminal cases and that class of civil cases relating to real property. The inferior courts shall have cognizance, "of all other civil cases:" same *art.* 1 *sect.* Here then is another distinction between criminal cases, and "all other civil cases," cognizable in the inferior courts: and *ex concessu* of counsel there is nothing in the *constitution* which excludes the inferior courts *from* sustaining a jurisdiction over equity suits, under the sweeping clause of all "other civil cases." But the third section of the judicial act of 1799, is I think conclusive as to the scope and latitude which should be allowed to the terms "civil cases." It declares that the said superior and inferior courts, shall have full power and authority to hear and determine all causes, both civil and criminal of which they shall severally have jurisdiction. Now the term "civil," must evidently mean all cases (whatever technical appellation they may assume, in the shape of an action, or chancery bill) which cannot be legally denominated *criminal cases.* The 53d section of the judicial act of 1799, confers a chancery jurisdiction upon the superior courts. Therefore equity proceedings must be denominated civil cases, agreeably to the mode of classification adopted in the 3d section of the judicial act; and I may add that the terms "all other civil cases" used in the 1st section of the 3d article of the constitution appear to authorize a similar conclusion, for the constitution speaks of only two classes of cases, crimi-

nal and civil cases; and it will not I presume be contended that the judicial department can take cognizance of cases which do not fall under one or the other of those classes; the conclusion is then irresistible, that if an equity case is not a civil case, the court has no authority to try it.

This is the dilemma we are are reduced to by establishing, or rather attempting to establish a distinction between an equity and a civil case. Upon the second ground of the motion, I am therefore of opinion that an equity case is a civil case, and that this bill cannot be tried under the prohibitory provisions of the act of assembly, it not being a case relating to the right of real and personal property.

Motion overruled.

Georgia—Chatham County.

The State *v.* Asselin. *Habeas Corpus.* 1808.

CHARLTON, Judge.

THE prisoner has been arrested and committed, by virtue of the following warrant:

" State of Georgia—Chatham County.

" *To any lawful Constable of said County.*

" You are hereby commanded to take the body of *Charles Asselin*, and bring him before me or any justice of the peace of said county, to answer to a charge exhibited against him by *Lewis Mallet*, for enveigling and feloniously carrying off the following named negroes, which the deponent was legally possessed of, to wit: *Sophia* and her son, a child; *Benjamin*, *Delphine* and her son; *Muttpuin*, *Dubin*, *Antonia;* in all eight negroes, and one horse, and bring him and the said negroes and horse, if found, before me or any other justice of the peace of said county, and this shall be your warrant. Given under my hand and seal, the 27th day of *July*, 1808.

" JOHN POOLER, J. P."

This is the language and form of the warrant; and the affidavit of *Mallet*, upon which the warrant is founded, states the commission of the felony in the most positive and unequivocal terms.

The prisoner is now brought up by habeas corpus, and his counsel move for *his discharge*, upon the exhibition of evidence, written and parol, which they contend clearly show that no felony had been committed, and that this prosecution is a mere dispute about the right of property.

It appears from the evidence adduced by the prisoner, that he took possession of the negroes named in the warrant, in pursuance of a letter of attorney from one *Monet*, an inhabitant of the island of *Cuba*, who is admitted, on all sides, to be the legal owner. This letter of attorney is dated at the *Isle* of *Cuba*, 13th *May*, 1808.

The prosecutor, *Mallet*, claims the right to retain the possession, and to exercise a qualified property over these negroes, by virtue of an authority given to him for that purpose, by madame *Monet*, the wife of the proprietor *Monet*, who had delegated to his wife, in a letter of attorney, dated the 8th day of *October*, 1806, a full power to sell or otherwise to dispose of them for his advantage. It was in evidence that when Mrs. *Monet* left this state two years ago, she deposited in the hands of her brother, *Lewis Mallet*, a blank power of attorney, to which she had affixed her seal and name, in the presence of a witness, *P. Dupon*. This letter of attorney transfers to her brother, all the rights relative to these negroes, which she had derived from her husband *Monet*, but was filled up not longer than six weeks ago, and is dated the 30th of *July*, 1807.

Further evidence was offered, to prove that *Mallet* had full notice of the authority given by *Monet*, to the prisoner Mr. *Asselin*, and, consequently, of the revocation of madame *Monet's* authority.

It is unnecessary to dwell on the exchange of these negroes with *Charles Debrosse*, as by the deed of the 7th of *July*, they were repossessed by the agent or attorney of *Monet*.

This, in substance, was the nature of the testimony adduced to repel, and to controvert the round charges of felony stated in the affidavit of *Mallet*, and the warrant of the magistrate.

The felony charged, is of a capital nature, and against my *then* conviction, I (*in favorem vitæ*) permitted this extraneous investigation, urged at the same time by the prisoner's counsel, who felt no doubts as to the admissibility of this kind of testimony, on the return of a habeas corpus.

Mitchell and *Bulloch*, the prisoner's counsel, contended, that not only the general doctrines of the law, but universal practice authorized an examination of *all the circumstances* of the case, as well on the part of the republic as on the part of the prisoner; that this examination was not confined by the principles of law to the depositions taken before the magistrate, but might be legitimately extended to every and all kinds of evidence, which could be produced on *either side*, to show that a felony *had*, or *had not* been committed. And under this impression of the law, they moved for a discharge of the prisoner *Asselin*, because it did appear, from the evidence submitted to the court, that instead of a felony having been committed, this prosecution was founded on the grossest malice, and every bad propensity of the human heart.

These positions having been asserted with much confidence, by my brother *Bulloch*, I hesitated in giving an immediate opinion, from that respect which is due to his professional abilities.

A few hours' reflection, however have not produced any revolution, in the general opinion which I gave yesterday. Whatever sentiments I may entertain of this prosecution, or of the character of Mr. *Asselin*, I feel my conscience and my judgment encompassed by obligations, which I shall faithfully discharge, without permitting my passions to be warped by circumstances which are connected with the relative situation of men in society. I must decide upon principles of law; and when my mind is irresistibly convinced of their applicability to a particular case, I am not at liberty, in order to come at a

purer system of justice, to consult my discretion, or my feelings.

I am tied down by precedents where they do not militate with the constitution or the law. It is the glory of our people, that their rights are dependent upon fixed principles, and those fixed principles are contained in the fundamental provisions of the constitution; in the adjudication of our courts; in the precedents established by our ancestors. The imperial *legibus solutus* is established so soon as a judge sets up his opinion against an uniform current of authorities, which have been stamped with the seal of wisdom, and acquiesced in by the people. The plain and upright *Grose* once said, that it was better for the subject, that even faulty precedents should not be shaken, than that the law should be uncertain. 2 *T. R.* 24.

In this sentiment I concur, and will now proceed to show, upon the authority of precedents, 1st, that it is not competent for the prisoner, on the return of the habeas corpus, to go into a *full defence* of his case, for the purpose of establishing his innocency, or of controverting the facts stated in the depositions of the state witnesses; and 2dly, I will laconically state the reasons, upon which is founded the necessity of an *ex parte* investigation, on a motion to bail, or to discharge the prisoner.

1st, The first case I will cite is that of the *King* v. *Horner*. *Leach*, *C. L. p.* 226. It is there said, that the practice of this court is, and upon a reference to the officers of the crown office, we find it to have been long established, that even when the commitment is regular, the court will look into the depositions to see if there is sufficient ground laid to detain the prisoner in custody; and if there is not, they will bail him.

So also when the commitment is irregular, if it appear that a serious offence has been committed, this court will not discharge or bail the prisoner, without first looking into the depositions, to see whether there is sufficient evidence to detain him in custody.

What depositions are here alluded to? Any depositions which may be offered on the part of the prosecution, or by the prisoner and his witnesses?

Certainly only the former.

The statutes of 1 and 2 *P.* & *M.* and 2 and 3 *P.* & *M.* order, that justices of the peace, when any prisoner is brought before them, on a charge of felony, *shall* take the examination of the said prisoner, and the information of them that bring him, of the facts and circumstances thereof, as may be necessary to prove the felony, shall be put into writing within two days after the examination, and certified to the next general jail delivery.

No prisoner brought before a magistrate is sworn to his examination. 1 *M'Nally*, 47. Nor are any depositions taken by the magistrate, other than those of the persons charging the prisoner with the felony. What other depositions can then be exhibited on the return of an habeas corpus, requiring the cause of the caption and detention of the prisoner, than the depositions of the persons informing against him? No others can be exhibited in aid of the warrant. I am therefore irresistibly compelled to say, that the depositions spoken of in *Horner's* case, are those taken conformably to the statutes of *Philip* and *Mary;* the depositions of the persons bringing the prisoner before the magistrate. By no *data* presented to my mind, can I for a moment suppose, that this case refers to all depositions which may be produced, as well by the public officer as the prisoner himself; because, in pursuance of the requisitions of the statute of *Philip* and *Mary*, no other depositions than those of the informers can be exhibited to the court on the return of the habeas corpus.

This case was determined in the 23d of *George* III.

The next case is anterior in point of date, 13th *George* II. and is as conclusive on this doctrine, as can be conveyed in the *English* language. I will state it in the words of the reporter:

" *Dominus Rex* v. *Greenwood.* " He came up on a habeas corpus, charged with a commitment, for a robbery on the highway, and the *prosecutor* attending said he was the man; and though eight affidavits of credible persons, proving him to have been at another place at the time the robbery was sworn

to, were read, yet the court refused to admit him to bail, but ordered him to remain until the assizes." 2 *Str.* 1138.

Here then was evidence brought forward by the prisoner which proved an *alibi*, yet the court would not depart from the fundamental principles of the law, which, at this stage of the prosecution, confines the investigation to the ex parte depositions of the crown or state witnesses.

Upon the authority of these cases, and the reasoning I have attempted to connect with them, it results, that no evidence extraneous to the depositions and informations taken by the magistrate, ought to be admitted to controvert the facts contained in these depositions, or the charge exhibited in the warrant of commitment. These cases are fortified too by another principle of law, that no one can, in any case, controvert the truth of the return to a habeas corpus, or plead or suggest any matter repugnant to it. 2 *Hawk. p. c.* 113. *Bac. Abr.* 1 *vol. p.* 226, in notes.

2dly, I will now state the reasons which induce the necessity for the adoption of the principles and doctrines advanced.

The first reason is, that if the court undertakes to decide from evidence *dehors*, that which is certified by the magistrate, it consequently goes into a plenary hearing of the merits of the case, and *per obliquum* decides on the innocency or guilt of the accused. It consolidates the facts with the law, against the maxim *de facto juratores, de lege judices respondent*, and against the law and the constitution, which place an ultimate condemnation and acquittal in the hands of a jury. Is there a greater hardship in refusing a full statement of the evidence on both sides before the court, at this incipient stage of the prosecution, than in that other stage of it, when the accusation is delivered to the grand inquest, in the solemn form of an indictment, in which the whole republic complains of an injury to its peace, its government and dignity? And yet the investigation before the grand jury is ex parte.

Another reason is, that if evidence on both sides is admitted at this stage of the prosecution, the court must weigh the cre-

dibility of the witnesses, which is the peculiar *province* of the jury. Cases may occur, in which honest men may be temporarily the victims of perjury and malice; but virtue and integrity cannot long suffer under the benignant reign of our laws. Is the citizen or the man illegally arrested? The indictment and the action for false imprisonment afford an ample redress. Is the citizen prosecuted without cause, with fraud and malice? He finds a reparation in the action of malicious prosecution. Is he falsely charged? The degrading and everlasting punishment of perjury atones for the outrage on his reputation and honour.

At the same time, then, that I feel myself obliged to obey the stubborn principles of law, in opposition perhaps to what abstract principles of justice may suggest, it ought to be a consolation to the persons who must submit to this opinion, that for every injury the law affords a coextensive remedy. Though I cannot receive this evidence on a motion to discharge the prisoner, yet I am not precluded by any principle of law from permitting it to regulate the bail which I conceive it proper to require.

It is therefore ordered, that the prisoner be bailed in the sum of 500 hundred dollars, and two securities in 200 dollars each, to appear at the next court, to answer to a bill of indictment, for the felony charged, and that security in similar sums, to prosecute, be given by *Lewis Mallet*.

Noel for the prosecution; *Mitchell* and *Bulloch*, for the prisoner.

Massachusetts: Court of Common Pleas.

SUFFOLK COUNTY, JULY TERM, 1808.

Gilbert and Dean *v.* The Nantucket Bank.

THE case which is here briefly reported, was founded upon what is commonly termed a *bank bill*, issued by the *Nantucket* bank. The plaintiffs, being possessed of a thirty dollar bill, sent an authorized agent to present it to the bank,

for payment, who on a certain day presented the same, and after spending a large portion of the bank hours in the bank, could not obtain payment. All the bills issued by the *Nantucket* bank, are in the same form and worded in a similar manner. By each of these bills "*The President Directors and* COMPANY of the *Nantucket* Bank" promise to pay a certain person, or the bearer, so many dollars on demand. Payment not having been made when the plaintiffs' thirty dollar bill was presented, "The president, directors and company of the *Nantucket* bank," (the words used in the bills) were summoned to answer the plaintiffs in a plea of the case, founded upon the promise contained in the bill, the plaintiffs averring that they were the bearers, and that the bill came to them for a valuable consideration. "*The President and Directors* of the *Nantucket* Bank, the defendants in the action came, &c. and plead they never promised, &c."

The evidence for the plaintiffs was as follows: A witness was called, who testified that on the day named, he was in the *Nantucket* bank, when he saw the plaintiffs' agent come in, and in their name demand payment of a certain thirty dollar bill, which he (the witness) was enabled to identify, because he then put the initials of his own name on the back of it. Upon examination, he said it was the bill declared upon and shown to him at the trial. The counsel for the plaintiffs then offered to read the bill to the jury, but the counsel for the bank objected. The objection was, that there was no such corporation in being as the defendants summoned; that in this action no judgment could be rendered, and if a judgment was rendered, no execution could be levied. The style of the bank in the act of incorporation was *the President and Directors of the Nantucket Bank*; the word *company* was not mentioned. True it was, from accident or design, if you please, the *President, Directors and Company of the Nantucket Bank*, was the name and style of the promisors in the bills issued by the bank; yet because the bank had issued their bills in a *wrong* name (purposely perhaps) and had been sued by the *same name*, therefore the plaintiffs ought not to be permitted to read the bill to

the jury, and ought not to have a verdict, judgment and execution in their favour. This was the substance of the objection.

To this it was replied, that if the defendants were misnamed, they ought to have plead the misnomer in abatement: That now it was too late, after coming in and confessing themselves the real defendants summoned, and pleading in bar: That to permit the objection to prevail was to permit the defendants to defraud the public, and take advantage of their own wrong, &c.

After consultation, the court permitted the bill to be read to the jury; the hand writing of *Joseph Chase*, the president, having first been proved.

It there appeared in evidence, from two witnesses, who were in the bank when the demand was made, one of whom kept a journal of the proceedings there, that the person who acted as teller did not *absolutely refuse* payment, but stated that his rule was to attend to one person half an hour, and if he had not then finished with him, to give the next half hour to the next person in waiting, and so on. The agent of the plaintiffs then waited upwards of an hour, and was afterwards told that his turn could not come before the bank hours were over for the morning. In the afternoon he attended again and met no better treatment, and could not during the *whole* day get his bill paid. It appeared further from the testimony of these witnesses, that the person who acted as teller, (and there was but one person in the bank) purposely wasted the time and avoided payment as long as he could. That to every body *but an inhabitant of the island of Nantucket*, he paid in *fourpence halfpenny pieces;* that he fumbled each of these pieces over between his thumb and finger several times, to discover whether it was a fourpence halfpenny piece or a five cent piece, and when this discovery was made, with a pen and ink and large piece of paper he set down several figures and made a long sum in arithmetic, to find out whether sixteen fourpence halfpennies made a dollar, and this being at last ascertained, *one dollar* was thus paid. In this way half the amount of a bill might be paid in the course of half a day. But the difficulty ended not

here; he would not let you carry half the money away unless you left the whole bill, although you offered to indorse it or give a receipt for it; and you must go away at dinner time and go through the same trouble in the afternoon, to get your bill paid. One of the witnesses stated that he was on the island seventeen days and had several bills to be paid; that he attended the bank assiduously every day, and in the seventeen days with the greatest industry and exertions, he was able to get the sum of *four hundred and seventy-two* dollars paid, and no more, which was counted in less than half an hour at one of the *Boston* banks.

The plaintiffs insisted that the shameful conduct of the bank in this case amounted to a refusal, and believed they had proved every thing necessary to obtain a verdict.

The defence was of a singular nature, and as we could gather it from the desultory and immethodical argument of the counsel for the bank, who was for several hours addressing the jury, consisted principally in the following points: he first relied upon the misnomer to the jury, notwithstanding this objection had been overruled by the court. Then he found, or thought he found, some other defect of form in the writ. Then he argued *Gilbert* and *Dean* could not be the *bearers* of the bill, because *their agent* presented it. Then he said there was no evidence of a demand upon the president or cashier, the person in the bank at the time of the demand being neither, and no evidence of a refusal; and having made all other objections that had the appearance of being legal, he next addressed himself to the feelings and passions of the jury. He said that the bank was *run upon*, that the jury ought not to assist in making the wheels of speculation revolve; that the plaintiffs did not want gold or silver money; they had no customhouse bonds to pay, and that the jury ought not to oblige the bank to pay its bills, because speculators wanted to make two or three per cent. by getting specie for the bank note. That in these hard embargo times, no country bank could pay all its bills, and should not be compelled to pay them; that the bank must call in that case upon individuals, and the injury

would spread; and many arguments of a like kind were used, founded upon the supposed inability of the bank, and the compassion of the jury.

The counsel for the plaintiffs made a satisfactory reply to each part of the defence, and commented with some severity upon that public institution, which, incorporated by one name, should attempt to mislead and defraud the public by using another, and ridiculed with much success the weakness of that argument, which contended that a bank ought not to be called upon to give specie for its notes, because it had foolishly or fraudulently issued more bills than it could pay. The stigma of speculation has often been attached to pursuits which compel an unwilling debtor to pay his honest debts; but he saw no dishonourable employment nor unfair gain in asking a person to pay his note of hand, given for a valuable consideration, nor in sending back to their sources the floods of that paper currency, with which the metropolis has been so often inundated by the country banks. It was perhaps of the greatest public utility.

Wetmore Chief Justice, and *Donnison* Justice, then charged the jury, who, after retiring for a short time, returned a verdict for the plaintiffs.

The bank, still unwilling to pay its own bill, moved an arrest of judgment upon a supposed defect and omission in the declaration; which motion was argued near a whole day; but the court eventually decided that the defect was formal only and not substantial, and could not be taken advantage of after verdict, and would not arrest the judgment.

Still determined not to pay its note, the bank claimed an appeal to the supreme court, where many months will elapse before a decision can be had. It may not be improper to add, that there were between ninety and one hundred actions entered in the same court against the same bank, the merits of which are similar to the one above reported; and which will not sooner be determined. Judicious people will make their own comments; and it may perhaps be a question hereafter agitated, whether it be not the duty of legislators to disfran-

chise a corporation which should be guilty of gross misconduct.

Two observations more perhaps should be made. The first is, that *Nantucket Pacific Bank* have always paid their bills punctually; secondly, that "*The President and Directors of the Nantucket Bank*" and their officers, since the above reported trial was had, can tell without the use of pen, ink and paper *how many fourpence halfpennies make a dollar*, and have promptly paid all bills presented to them.

Let us say with an old author, "he is foolish indeed, whom experience maketh not wise."

[From the Paris Argus of October 6, 1808.]

LAW OF NATIONS.

THE court of cassation in *France*, has lately decided an important question which concerns the law of nations and public right, viz. Whether the effects of the right of asylum, relative to fugitive criminals, ceased by the union of the country where the crime was committed to the one in which the criminal has taken refuge. The court decided that these effects ceased; from the motive that the right of asylum is not a personal right belonging to fugitives, but a result of the respective rights of nations, which ceased by their union under the same laws and the same government. This principle, of which the court made a just and rigorous application, occasioned the rejection of the appeal of a man of the name of *Odone*, a *Genoese*, condemned to twenty five years' hard labour, in irons, by the criminal court of *Genoa*, as being convicted of a robbery committed in 1800, in the house of Mr. *Figari*, and for which robbery the said *Odone* was at that time condemned to nine years' hard labour in irons, by default. The rigour of the principles got the better of the consideration that *John Odone*, upon seeking refuge in *France*, had entered into the service, and had even distinguished himself by his valour in the battle of *Trafalgar*

[Selections from late London Papers, 1808.]

Court of Chancery.

Attorney General *v.* Hicks.

THIS was a motion arising upon an information filed by lord *Redesdale*, when attorney general, at the instance of sir *Christopher Hawkins* and lord *Dunstanville*. The grounds on which the information proceeded were these: queen *Elizabeth*, in the 25th year of her reign, had granted letters patent for incorporating the hospital of *St. Lawrence de Pontehy*, near *Bodmin*, in *Cornwall*, for the purpose of maintaining 38 lazars, or leprous persons, of both sexes, and had endowed the said hospital with various lands and messuages, to the value of 150*l.* per annum for the support of these lazars.

That species of pestilence having fortunately become extinct, at least in this country, the endowments of the hospital had got into the hands of other people, who had no sort of claim under the charter of incorporation, and had come into possession of various hands by leases, and of which the defendant *Hicks* was one. An information was filed against these persons by lord *Redesdale*, when attorney general, and the matter was then referred to a master in chancery, to inquire into the appropriation of these funds. From his report it appeared, that there had not been for a considerable period, and was not then, sufficient number of persons who could establish any claim to the benefit of the charity, on the ground of their being lazars, the persons for whose benefit the charity was destined, and that the revenues of the charity had gone into other channels.

This report having come before the chancellor, as the guardian of public charities, particularly those established by the crown, it was suggested before lord *Erskine* that as the grant was made by queen *Elizabeth*, in virtue of her dutchy of *Corn-*

wall, the interests of the prince of *Wales*, as duke of *Cornwall*, were concerned.

Mr. *Richards* and Mr. *Benyon* now contended, that whether the hospital was endowed by the crown, or from the lands of the dutchy of *Cornwall*, yet still it was devoted to charitable purposes alone; and since these purposes had happily become obsolete, it was proper either to receive a new direction, or that the funds should revert to the original donor. They submitted, however, that the lands and messuages appropriated to the support of this incorporated charity did not revert to the donor or his heir, but remained still allotted with the charity to which they had been originally destined. They therefore submitted that the subject be referred anew to the master, who should be ordered to draw out a new scheme of charity, for the support of which the funds might be applied.

Sir *A. Pigot* appeared in behalf of the prince of *Wales*, as duke of *Cornwall*, and contended that as the grant of *Elizabeth* was of certain lands, as of her dutchy of *Cornwall*, the crown could not properly be considered as the donor; and that if the property reverted to the heirs of the donor, it must revert to the prince, as duke of *Cornwall*.

The lord chancellor observed, that in the present stage, he had nothing to do with the question, as it respected the rights of his majesty, or the prince of *Wales;* but there was this informality that would put a stop to further proceedings for the present, and that was, that the information had not been filed by the attorney general.

The application was therefore postponed for some days, till the attorney general could be consulted.

Court of King's Bench.

SITTINGS AT WESTMINSTER, JULY 7, 1808.

North *v.* Miles and Branscomb, Knights, the late Sheriffs of Middlesex.

THIS was an action for a false return to a writ of *ca. sa.* and not duly executing the same.

Mr. *Park* stated the plaintiff's case. The plaintiff in the month of *May*, 1807, had issued a *ca. sa.* against Mr. *Bromley*, who then exercised the office of under sheriff to the defendants, for 200*l.* upon a promissory note. The writ was delivered to the sheriffs to be executed, and a warrant was made to one *Leech*, an officer, to execute it. Upon the return of the writ *Bromley* was not taken, but a return of *non est inventus* was made, and the plaintiff lost the effect of his suit. At this time, Mr. *Bromley* had a house in *Southampton* street, *Bloomsbury;* he had since quitted his house; and was no where to be found. This action was brought to recover damages from the defendants, for not having executed the writ when they might have done it. The *Middlesex* election commenced on the 18th of *May*, and the defendants were attending there in virtue of their office, and Mr. *Bromley* was there also in virtue of his office.

Witnesses being called, *Leech*, the officer, said that he had been several times to Mr. *Bromley's* house, but could never find him; that one evening he had waited for him a long time, and was met by Mr. *Lee*, the plaintiff's attorney, who upon being told of it said it did not matter he would renew the writ. Upon being asked if he had been to the *Middlesex* election, he said he had been there once, but that Mr. *Bromley* was not there.

Mr. *Cater* who attended at the election every day could only speak to seeing *Bromley* there once.

Shepherd, a sheriff's officer, had also writs against *Bromley*, and could not take him.

Lock, a clerk of Mr. *Lee*, said, during the time that the writ was out, he met *Leech* and expostulated with him upon not executing the writ, when *Leech* said, he dared not do it, for Mr. *Bromley* had threatened to suspend any who had the boldness to arrest him, but he would get Mr. *Sheriff Branscomb's* indemnity, and would take him the next day.

Upon *Leech* being called up again by lord *Ellenborough*, he would not swear that such a conversation did not take place, although he said, he had not been prevented by any such threat, but had used all due diligence.

The attorney general contended, that it did not appear that *Leech* could have taken *Bromley* under the writ, and that even if he had taken him the plaintiff could not have got his money, and was therefore not damnified.

Lord *Ellenborough* said, that the question was, whether due diligence had been used; and it was clear that the sheriff might have taken the under sheriff, if there had been an earnest intention so to do. The jury found a verdict for the plaintiff, damages 200*l.*

SHAM PLEAS.

Blewit *v.* Marsden.

THE rule in this case, which we stated in the term, was yesterday made absolute, that the plaintiff should be at liberty to sign judgment as for want of a plea, and the defendant's attorney pay the costs of so much of the proceedings as were occasioned by the sham pleas, which were of an extraordinary nature. The debt was for 200*l.* on a promissory note, and the defendant pleaded that the plaintiff owed him a much larger sum, on occasion of a judgment recovered in *Ireland*, and also a further sum of 2000*l.* adjudged to him in the pie poudre court at *Bartholomew* fair with 500*l.* costs. This was most palpably a sham plea, and there were a great many of them filed in various actions.

The defendant had been ruled to abide by his plea, in which case, it is usual to withdraw the plea, if it is a sham plea, unless some few days' time may be gained by letting it stand, and then judgment is given upon the proceedings as they stand.

Mr. Attorney general regretted that the case was brought before the court, as sham pleading was always overlooked by the court; and it was best for the bar and the attorneys, as well as the suitors, that it should pass *sub silentio*. For this reason we omitted to report the case yesterday, but different statements having appeared, we believe it has been misunderstood.

Lord *Ellenborough*, Chief Justice, in making the rule absolute, censured the framer of this plea. He did not pronounce any judgment against sham pleading in general, because it was impossible to correct it; but he said *dabitur licentia sumpta pudenter;* there must be moderation used. The pleas in this case are palpably false; and they have been framed in such a manner as to involve nice questions of pleading, so that if the plaintiff does not happen to reply properly, the court may be occupied with a long argument. This must not be permitted. If this were allowed, the defendant, instead of saying, "and for plea in this behalf," would insert upon the record, "and for sham plea in this behalf the said defendant says, &c." *Rule absolute.*

DUEL CASE.

Baron Smith's Charge, in the Case of W. C. Alcock, Esq. August 1808.

GENTLEMEN OF THE JURY,

THE prisoners at the bar, *William Congreve Alcock* and *Henry Derinzy* stand indicted for the wilful murder of the late *John Colclough*. Against the former of these prisoners, the evidence perhaps establishes the charge to this extent; and if you should believe the other to have aided and assisted in the commission of a homicide at which he certainly was present, he also, in contemplation of law, would be a capital offender. An

endeavour has been made to fasten upon *Alcock*, a malice distinct from that which the law implies from the act which he has done. The attempt, I think, has altogether failed. But though it had succeeded, it might still have been a vain one. For to what purpose go into proof of what the law infers? Or how could any accumulation of criminality aggravate the homicide which has been committed, into more than murder? It would be insinuated that Mr. *Colclough* fell a victim to the general and deliberate malice of the prisoner. That this latter came upon the hustings, determined to manage his election with pistols in his hand, and to put down all opposition to his interests by the terror of personal responsibility and an impending duel. But whatever may have been insinuated, no such mischievous intentions or dispositions have been proved. On the contrary, the fatal meeting in this case seems to have originated in unforeseen and sudden irritation; insomuch that if the duel had followed upon this, more quickly than perhaps it did, it might be doubted whether the homicide in which it ended was more than a manslaugher. That the transaction which irritated *Alcock* was casual and unexpected, and even that it produced astonishment in him and his supporters, is not only in evidence, but has been proved on the part of the prosecution. Of animosity or illwill between the prisoner and the deceased, it is not enough to say that there is no proof. The very reverse of malice has been shown; and on the day before the unfortunate catastrophe took place, they appear to have shaken hands in a familiar and cordial way. It has indeed been suggested, and I think shown, that *Alcock* selected the deceased as the person responsible for the grievance of which he complained. But was he so far wrong? I conceive not. He was culpable indeed in the kind of responsibility which he imposed; but not in his choice of the person on whom to cast it. If he had sought to make him answerable in another and a legal way, I should not hesitate to say, that Mr. *Colclough*, the candidate himself, was properly selected and applied to, in preference to any of his agents. Nay, if duels were to be, what they ought not to be, endured, and if every subordinate agent

was to answer personally for the misconduct of his own department, whatever benefits might result from such a system, the sparing of human blood would not be amongst the number. Mr. *Colclough* has also been represented as a martyr to a constitutional principle: to the freedom of election, and right of every voter, however humble his situation, to exercise his franchise idependently and free; for example, from the coercive influence of his landlord. To this view of the case there is a preliminary objection. It might seduce you to the finding an unwarrantable verdict: one founded upon political, not legal grounds. You are not to convict the prisoners, because you think the elective franchise should be unshackled: nor to acquit them, because you hold it to be wholesome and expedient that the influence of landlords on their tenantry should extend itself to this control. But there is no pretence for the allegation that Mr. *Colclough* was such a martyr as is described. Mr. *Alcock* had tolerated without complaint, on this election, the opposition of tenants whose landlords voted for him; and all he deprecated and resented, on the occasion which produced this most unhappy quarrel, all his supporter, Mr. *King*, protested against on the hustings, was a measure violating, not promoting the freedom of election; and which was as unconstitutional as it was ungentlemanly, clandestine and unfair. That such measures had been resorted to, was there not more than sufficient reason to suspect? Was it possible to resist the impression made on *Alcock* and his friends by the conduct pursued in the booth by Mr. *M'Corde?* No private conference with the tenants was required by Mr. *Roper;* and if all was fair, why was he not allowed to read the letter? Why was all access to them effectually prevented? If no contrivance, more dexterous than candid, had been practised, why was the business conducted with a triumphant sneer? Mr. *Roper's* testimony perhaps will show by whom the quarrel was produced; and we may by and by consider who prevented all accommodation. If an averseness from every thing like conciliation be evidence of malice, this averseness is to be found, not amongst the friends of Mr. *Alcock*, but amongst those of the deceased. The challenge unquestion-

ably was given by the former, but it was not given absolutely. An alternative was offered, which Mr. *Colclough* did not accept. I allude to that interview in the street, when, holding what may be called the title deed of his resentment in his hand, the prisoner stated his supposed grievance, and the redress which he required. At the time of this expostulation, he was under the warm influence of those impressions which the recent conduct of *M'Corde* had been calculated to produce. In this interview he spoke the intemperate language of passion; that is to say, he uttered the indiscreet effusions at once of anger and of truth. Yet thus irritated, and incapable of all dissimulation, he left an inlet, and what he conceived to be a fair one for accommodation. Mr. *Colclough* indeed denied (and I am persuaded with perfect truth) all dishonourable and indirect proceedings upon his part. Mr. *Alcock* at once admitting the truth of the disclaimer, however felt it to be only a denial f personal interference; and explained himself by fastening his charge upon the agents; and if my memory serves me, distinctly on *M'Corde*. Here we find an open. Did the deceased avail himself of it? Yet what was there to prevent his doing so? What at least was to prevent his taking a middle course? He might have offered to institute an inquiry into the conduct of his agents; and undertaken that the polling of the disputed tenants, or at all events his profiting by their support should abide the result of this investigation. Mr. *Alcock's* challenge of him was hasty. But haste is not malice. If they be not incompatible, at least they are distinct. If, however, in delivering the defiance, there was haste upon the one side; in forcing on the meeting, there was deliberation on the other. Of the terms at first required, much was afterwards abated. *Alcock* offered to accept one vote from the tenants; and leave the other to his rival. Would this offer have been rejected, unless the suspicions of tampering were well founded, or a quarrel was desired? The answer to this offer was a flat refusal; and it was added that Mr. *Colclough's* carriage was in waiting; and they must go out. This offer was made by Mr. *Alcock's* second; (I give the gentleman his ille-

gal title;) who with a laudable perseverance in advocating peace, called three times in the hope of procuring an interview with Mr. *Colclough*. Once he called alone; a second time in company with lord *Valentia;* and, after his lordship's attempt at reconciliation had proved ineffectual, not yet discouraged, he for the third time called alone. If lord *Valentia's* message was from the committee, it was however fully and expressly sanctioned by Mr. *Alcock;* his acquiescence was required by lord *Valentia*, as a *sine qua non* to his undertaking the communication; and this acquiescence was testified by the attendance of the second. Again, if this message contained a mere proposal of postponement, yet this might, and probably would have led to accommodation; and in the meantime what punctilio could stand in the way of assenting to it? Lastly, if Mr. *Colclough's* friends did not wish to treat with the committee, or for a mere postponement, the visits and propositions of Mr. *Percival* seemed calculated to meet both objections. He came not from the committee, but from Mr. *Alcock;* not to adjourn the duel, but to reconcile the parties. He wished to see Mr. *Colclough;* but all admittance was refused. He was as inaccessible as the tenants of Mrs. *Cholmondely* had been before. Mr. *Percival* thought, if he could see him, that matters might be settled. I am of the same opinion. I believe if Mr. *Colclough* had been seen he might be still alive. But the only answer returned to these pacific overtures, was a formal denunciation of "*unpleasant consequences*," if the meeting did not take place in half an hour. There is perhaps a sense in which it may be said that the pistol, by means of which Mr. *Colclough* fell, was not put into the hands of Mr. *Alcock* by Mr. *Percival* or Mr. *King;* but by one who professed a friendship for him whom it deprived of life. There was indeed a friend of the deceased who appears to have recollected the duties, both of his friendship and his cloth. In his communication, though an angry one, with him the prisoner does not seem to have been averse from accommodation. I am unwilling to reflect upon the conduct of a gentleman to whom an opportunity is not afforded of vindicating himself. But I

cannot avoid expressing my regret, that in the interview to which I allude, colonel *Pigott* did not second the conciliatory views of Mr. *Dudley Colclough*, more than he appears to have done. But malice is also sought to be imputed to the prisoner, from certain circumstances which occurred upon the ground. The prosecutor's objection is not so much to the murder, as to the way in which it was committed. The prisoner wore spectacles; and Mr. *Colclough* would have had a better chance for life, if his antagonist had not been so assisted. It is probable he would: and this chance would have been still better if, accommodating him still farther, Mr. *Alcock* had fought blindfold. But can no meeting be what duellists would call fair, unless one of the combatants wears a bandage on his eyes? Somewhat similarly situated is a nearsighted man without his glasses. The prisoner is shortsighted. Perhaps his declarations on the ground, being part of the *res gesta*, are evidence of this. But it is the less necessary to inquire whether they be so; because, *aliunde* the fact is very fully proved; and he appears, at the meeting, to have worn the ordinary spectacles of a nearsighted man; spectacles which he had before been accustomed to make use of; and had not provided for this particular occasion. What a combination of the powers of different glasses may effect, is beside the question. But it seems sufficiently plain, that no single lens can, at most, do more than supply a defect of vision; and put him who labours under it on a footing with the man of perfect sight. If a man of naturally good eyes had a right to fight a duel, I should say that one of artificially good eyes must have the same. But the deceased also laboured under a defect of vision. This might be a reason for his using glasses; but could be none for his antagonist's consenting to do without them. All this latter could be supposed to know was, that he himself, without spectacles, could not see. But he was not bound to be so accurately acquainted with his adversary's infirmity as to know, that if both fought with the naked eye, they would be two blind men, consequently on a par. If they were not so, it was through the omission of Mr. *Colclough's* friends that it was otherwise; and the prisoner ought not to suffer for their de-

fault. But if the circumstance of the spectacles were in fact entitled to the stress which is laid upon it, would Mr. *Henry Colclough* have suffered the duel to proceed? Would he have confined himself to the mere threat of an indictment? Would he have even consented to give a signal, which in that case must have been for the assassination of his friend? If glasses could not be provided for Mr. *Colclough* on the spot, why did not his second require an adjournment of the meeting until they could be procured? Can we doubt that this requisition would have been instantly complied with? But Mr. *Colclough* had not been accustomed to wear spectacles; and Mr. *Alcock* had. And what is the natural inference from this? That he who did not use them did not want them; and that he who did, stood in need of their assistance. The change of dress is as immaterial as the glasses. This must have been either casual, or resorted to merely as a defensive measure. It was adopted on that side on which ten paces were made choice of as a safer interval than twelve, and on which it was requested that the signals should be given rapidly, with a like view to prevent mischief. As to the interference of *Derinzy*, however culpable in law, it does not appear to have been either sanguinary or officious, except in a good and unusual acceptation of this latter word. Not meddling, because he was selected as a friend of the other prisoner; and not bloody, because the tendency of what he did was not to endanger Mr. *Colclough*, but only to diminish the chance of Mr. *Alcock's* being hit.

Gentlemen, I have been compelled to enter into details, and to adopt expressions which may indirectly seem to give what I would, on the contrary, most scrupulously withhold, any thing like sanction or approbation of these dangerous and illegal meetings. They are not to be justified under any ordinances, either human or divine; and I protest against being for a moment supposed to give them countenance, from any language into which the peculiarity of the evidence may have betrayed me. Very peculiar, indeed, that evidence has been in the course of which we have seen the phenomenon of two capital offenders appearing, not at the bar, but on the table; not to

take their trial, but to give their testimony unmolested, under the eye of the prosecutors; and on a bill of indictment for the very offence in which they have had a share. Two indeed there are, both of whom, since persons thus circumstanced are produced as witnesses, we might have expected to come forward. I mean Mr. *M'Corde* and Mr. *Henry Colclough*. The absence of the latter is not satisfactorily accounted for; and that of the former is not accounted for at all. All we know is, that they might have thrown some light on this transaction, and that the prisoners were entitled to have this light thrown on it. In any obscurity in which their absence might have left it, they have, on the same principle, a right to whatever presumptions you can form in their behalf.

[With these observations, the learned judge accompanied his statement of the evidence; after which he closed his book; and after pausing for a moment, he proceeded to address the jury in the following words:]

Having thus recapitulated the evidence, as it appears upon my notes, it remains for me, in addition to the remarks which I have already made, to address to you, gentlemen, such few general observations, as a case so simple in its nature and circumstances will admit of: for simple in its nature and circumstances this case is; although you cannot fail to have observed not merely the reality, but if I may so express it, the parade of interest and sensation, with which it has been thought expedient to mark the present trial. Between us however, and this interest, between us and this sensation, there is, and ought to be, an impassable abyss. Law, justice, impartiality, are to be our guides; with prejudice and passion we have nothing to do, but to subdue them. One only feeling is permitted to enter into our deliberations, and to influence our decisions; I do not mean a feeling of party rancour or revenge; but that mild sentiment of mercy, which softens and pervades our law. In the county in which our circuit commission was first opened, very serious disturbances, and even tumults had prevailed; and it became necessary that the law should put forth its terrors, for the restoration of the public peace. Yet there, justice was not

stimulated; perhaps, I might even doubt whether it was properly assisted. Some disturbers however were tried, found guilty, and suffered death. But though these were not only salutary, but necessary examples, their trials, convictions, or executions, seemed to excite no considerable portion of public interest or attention. How different is the case of the charge which we are now trying! Yet strip it of the trappings and aggravations, with which I know not whether party zeal, or a more justifiable motive has sought to clothe it, and what does it amount to? To a transgression, with which we must on the one hand confess ourselves to be almost as familiar, as we must on the other hand admit it to be highly culpable and illegal. Two persons, disclaiming and violating the municipal law, prefer paying obedience to a false and mistaken code of honour; and one of these disclaimers falls, in a premeditated duel, forbidden by the law of the land; but which the erroneous system of punctilio, to which I have adverted, enjoins in some instances, and permits in many more. No sooner has this melancholy catastrophe taken place, than the friends of the deceased commence a vigorous prosecution against the causer of his death. But some of these prosecutors we may presume, we even know, to have themselves been present, aiding and assisting, at the perpetration of what they now represent to have been a murder: and in strictness of law, their representation is a just one. Some of these prosecutors we may conceive to have at one time been desirous that their champion should inflict the death which he has suffered; should do the very act, for which they now prefer a capital indictment. If abjuring the code of honour, and adhering to the rules of that, which we are here assembled to administer, the prisoners or the deceased had declined to accept a message, or been tardy in sending one, we may doubt whether these strenuous assertors of the law would not scorn to associate with such strict observers of it, and reward their pacific conduct with indelible disgrace. Thus, on the object of their blame, a hard alternative might be thrown; of being posted as a coward, or indicted for a murder. But when a man of amiable qualities and estimable

conduct, as I believe and almost know Mr. *Colclough* to have been, a public man, their friend and favourite, has fallen, his mourning adherents may think themselves entitled to have blood for blood, and to make the law an engine of private resentment or political revenge. In short, in seeming to demand justice, they may be only looking for retaliation.

Be this however as it may, my duty remains the same: my duty is to state mercifully what I conceive to be the law. Homicide, committed suddenly, on sufficient provocation, in the heat of blood, or ensuing on an unpremeditated quarrel, is manslaughter. But of this species of offence there appears to be no evidence in the present case, under any view which you would be likely, or perhaps warranted to take of it. But if homicide ensue on a deliberate duel, between parties meeting with deadly weapons, by appointment, such homicide will be murder, and expose the slayer to the heaviest penalties of the law. An attempt has been made to distinguish the present from an ordinary case. But I will not wound the feelings of the prisoner at the bar, nor insult your understanding, by dwelling longer on this topic than while I say, that the attempt appears to me to have been utterly unsuccessful; and the prosecutors to have more than failed to prove the prisoner an assassin. If indeed they had succeeded, his crime would have peculiarly called for the vengeance of the law; and in administering its rigours, you would not feel compunction. But, however fair the duel, the homicide ensuing on it is a murder. I feel some natural reluctance in stating this to be the law; and you may feel uneasiness at being reminded that it is so. However much and justly such combats are to be blamed, you may more abhor the sanguinary notions which produce them, and pity the victims of a law of opinion which you strongly wish to be repealed. You may have sons, you must have friends and relatives yourselves, and will ask of your consciences and hearts, whether the pride and infirmity of human nature might not lead you to wish that these should rather violate the law, than endure the scorn and contumely of (heaven knows!) an unsparing world, or incur the slightest stain or blemish on their honour. You will wish to

give the prisoner the benefit of these reflections: but whether you would be warranted to do so, is what I scarcely dare inquire; otherwise than by suggesting cases, which I conceive to be similar in their legal nature, for the purpose of illustrating and explaining your duties here. If an officer, at the head of his regiment, be called a coward and a scoundrel, and instead of cutting the offender down, challenge and kill him in a duel, he is a murderer by law; and if you are bound to find the prisoner *Alcock* guilty, you would be equally obliged to return a verdict of conviction against a gallant officer, under the circumstances which I have described. Yet on the other hand, the military punishment and intolerable disgrace, which must inevitably follow from his submitting to the affront, it cannot be necessary for me to dwell upon. If an aged and infirm, a beloved and respected parent be insulted and reviled, or even struck and beaten in the presence of his son, and this latter happen to kill the aggressor, in a regularly appointed duel, the transaction will be murder; and if you cannot acquit the prisoner, you could not acquit the child. If a husband find his wife in the embraces of another, and kill him unarmed and unresisting, on the spot, this is manslaughter of the lowest and most venial kind. But if, giving the adulterer farther time for preparation, and a fairer chance for life, he puts arms in his hands, and meets and kills him in a duel, the offence altering its character, becomes at once a murder; and if you are bound to convict the prisoner here, you would be also bound to a conviction in the case which I have supposed. Not because in morals the criminality is equal; but because both offences are murder in the eye of law. But let me ask of your consciences and your hearts as men, could you convict the officer, the husband, or the son? I have hitherto confined my observations to the case of *Alcock*. That of the prisoner *Derinzy* is somewhat different in its nature. But I have already observed that his interference does not seem to have been either bloody or obtrusive. At all events, he cannot have assisted in the commission of a murder which was not committed; and an acquittal of the first principal would therefore exculpate him. I will not

repeat, lest I might seem to inculcate the austere doctrine of the law: in once stating it, I conceive that I have sufficiently discharged my duty. Nay, even sitting where I do, I think myself warranted in doubting whether this doctrine be not a sort of anomaly in our code: existing in theory; almost abrogated in practice; by the astuteness of judges, the humanity of jurors, the mercy of the crown. Ill assorted to the manners and habits of these times, it seems indeed to have survived its day; and in the shifting of the social scene, to have been left inadvertently behind. This, gentlemen of the jury, was all I had to say. The evidence is before you. If you believe it, you have heard its legal result from the bench. You have the law of the land, bearing witness against the prisoners, on the one hand; the law of opinion on the other, endeavouring to excuse them: the one prescribing rigour, the other suggesting mercy. It is for you to pronounce which call you will obey. The trammels of my office forbid my adding more. But there is another far better voice than mine, to which, though I be silent, you may listen still. I mean that still small voice of which we read in the scripture, and which addresses itself to the consciences of good and pious men in the soft and soothing accents of clemency and peace. Its dictates may be followed, with a confidence the most implicit. It is the voice of him who cannot err; who cannot lead his creatures into error; who to justice without blemish, unites mercy without bounds; who, all criminal as we are, can yet acquit us and be just. To the influence of these secret and divine monitions, and (as far as infirmity can follow) of this divine example, I surrender you; and commit the case of the prisoners at the bar. I wait with some anxiety and much impatience for your verdict; judge whether I am impatient for a capital conviction.

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AND

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BY JOHN E. HALL, ESQ.

OF BALTIMORE.

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the production of the country the vessel belongs to. With regard to the coasting and trading between two ports of the enemy, that subject is peculiarly circumstanced, as depending on a seroon of indigo, of which no mention is any where made but in a receipt given at *Bay Mahon* from the former mate and the present master, from the tenor of which in the ordinary acceptance of things it is rather to be presumed was on board than as has been suggested; or, otherwise some order for the delivery of it would I conceive have accompanied the receipt; and I am inclined to think it not likely a master of a vessel going to *Guadaloupe* would leave a seroon of indigo behind unsold, in a country where it would always command a price and with the proceeds of which he might have profited by an adventure, notwithstanding the embargo. A seroon of indigo is not of great bulk and might have been secretly and clandestinely introduced by the mate without the privity of the master in the first instance, and has probably by him been since disposed of; and the smallest trading in opposition to the terms of the instructions, I apprehend would be fatal. Yet if this cause depended wholly on that transaction, as it appears to have been a business between master and mate, and not with the enemy, with the privity of the master, I should not think it such a trading in the terms of the instruction as would or ought to involve the present property in condemnation. The last cause assigned is however to me a weighty and important one, accompanied with the circumstances attending it. A vessel called the *Ohio* some months past is said to have carried a cargo belonging to Mr. *Lemuel Taylor*, of *Baltimore*, and a supercargo, Mr. *Holden*, to *Guadaloupe*, to have returned in ballast as the present master says; but the documents show that she returned with 15 hogsheads of sugar. That was not returning in ballast; certainly it was however but a little better. It does appear that the present master, *Thompson*, was privy to what she carried back; he might and probably was informed she had returned in ballast, and might so have expressed himself. I cannot suppose he meant in that particular any imposition on the court. Mr. *Taylor* in one of the docu-

ments swears that he sent out the brig *Eliza Ann* to bring back the proceeds of the brig *Ohio's* cargo, and we hear nothing more of the *Eliza Ann* than what appears in *Holden's* accounts of a balance due him on her cargo. It is pretended that the *Eliza Ann* carried nothing back but the returns for the cargo she carried out. This rests wholly on the suggestion of counsel. Then follows the present vessel, the *Derne*, on her first voyage, armed and equipped for war, with 25 men, 4 carriage guns, pikes, and small arms. A vessel having a most formidable appearance and apparently a fast sailer, originally destined for *Point Petre*, but who appears to have stolen into *Bay Mahon*. I say stolen, because a vessel appearing in sight, it seems to have been thought more advisable to put in there than to proceed on her original destination. This, in my apprehension, implies a consciousness of something that would not bear an investigation. She has no notarial departing from Mr. *Taylor*, as the *Eliza Ann* had, of going for the returns of the *Ohio's* cargo. Mr. *Taylor* appears to have thought something of that kind necessary for the *Eliza Ann;* and in my mind something like it would have been more prudent and necessary for the *Derne*. On the contrary, the only document from Mr. *Taylor* is the letter of instruction to the master, which is very general, has no allusion to the *Ohio* or *Eliza Ann*, but directs the master to obey the orders of Mr. *Holden;* or, in case he should have returned with *his*, (Mr. *Taylor's*) property, then to take freight. I do not observe in Mr. *Holden's* letters any intention of returning from *Guadaloupe*. The *Derne* continues at *Bay Mahon* about 20 days, apparently doing nothing; afterwards proceeds to *Bassaterre* and takes in the present cargo, with some additional hands. The motive for so doing may have been commendable, but the detention of such a vessel must have been expensive. The pretext that *Holden* was loading a schooner and could not attend to the *Derne* until the other was full, strikes me to have been a flimsy pretext. The *Derne*, having at length taken in her cargo, sails, is discovered and chased, uses many endeavours to escape, which in an ordinary case I would excuse; but is at last captured. The pretext for

arming was that war was expected between *America*, *England*, or *France*. That it was such that she might defend herself in either event, and yet she sails for a *French* island; had she gone to a neutral country it might have been permitted. I apprehend a vessel so circumstanced ought not to go to the country of either power she apprehends war with; because the other party in such case in my judgment has good cause to construe such conduct illicit and unneutral: and a manifest intention of taking, (should a war ensue) an active and decided part against *him*, which the laws of war do not in my apprehension admit. All circumstances combined, lead me to conclude that the present vessel was sent out either for sale or as a cruiser; or, to cruise against *England;* that the parties must have had in contemplation a war with *England* and not *France;* for, in the latter case, it would be sending the vessel to certain condemnation. I am also inclined to think the court is not in possession of all the facts of this case as to what was actually meditated with this vessel. The cargo she had on board could have been no object; the number of men I conceive to have been more than necessary for an ordinary trading; and although true it is, she was on the return voyage, when whatever might have been originally the design is to be considered as abandoned; to me it may be so, but I am not altogether satisfied that it was wholly so; on the contrary the conduct of the parties seem to me such that had they on the return met a vessel of inferior force, or such a vessel as could have been resisted with a prospect of success, I am disposed to think resistance would have been made; and that the original hostile purpose was still in existence. The property of the cargo I am not satisfied with. The usual affidavit does not accompany it. It would not have been conclusive certainly if it had been; but why depart from *prevailing practice*, which can do no harm. The whole of this case, in my judgment, is so unfavourable to the claim interposed, as to induce the court to reject it, and decree condemnation of the property in question in the first instance; and I feel it my duty to do so. The parties concerned have in their option to clear up this myste-

rious business before a higher and more enlightened tribunal, if they think it advisable to do so.

Halifax—Court of Vice Admiralty.

JANUARY 26th, 1808.

The Rights and Powers of CAPTORS and PRIZE AGENTS, over Captures and Proceeds, before final Sentence, considered: being the substance of a Judgment upon the return to a Monition in the Case of the HERKIMER.

DR. CROKE.

THE case which now remains for the decision of this court, arises upon a monition issued against *Andrew Belcher*, esq. "to bring into the registry the sum of £.41,671 19*s*. 4*d*. being the proceeds of the ship *Herkimer* and cargo; and also interest thereon at the rate of five pounds per centum per annum, to commence from six months from the day of sale; or to show cause why he should not pay the same." This vessel and cargo were condemned on the 1st of August, 1806; and an appeal was entered on the 6th of the same month. A decree of unlivery and appraisement was sued out; and, on the return, the valuation of the ship appeared to be £.3000, of the cargo £.37,896 5*s*. 3*d*. making in the whole £.40,896 5*s*. 3*d*. currency. A motion was made by the captors to take the property upon bail, but difficulties having occurred in procuring securities, the parties jointly prayed the court to direct a sale of the property, and the proceeds to be paid into the registry. The commissions for the sale of ship and cargo issued on the 18th and 27th of *September*, returnable in the usual form in one month. The sale by public auction was made on the 29th of *September*, 1806, by Messrs. *Hill & Co*. The conditions were, that the purchase money should be paid in six months, when Mr. *Belcher* became the purchaser of the ship, and the greater part of the cargo, for the sum of £.41,671 19*s*. 4*d*. The marshal returned the commission of sale, without the proceeds, which he alleged

were in the hands of the purchaser, to whom he had applied for payment, but without effect. Upon the 23d *September*, 1807, a general order of the court was made for all purchasers of prize goods to pay in the proceeds. No notice of this order was taken; a second general order was then made upon the 29th of *December*, and a monition was issued against Mr. *Belcher*.

To this monition an appearance has now been given under a protest against the jurisdiction of the court, which it will be necessary first to consider, because if the court has gone beyond the line of its authority, the party is entitled to his dismissal.

The substantial part of the protest alleges, "that the said ship *Herkimer* and her cargo were sold at public auction by *Charles Hill & Co.* of *Halifax*, auctioneers, in pursuance of an advertisement inserted in the public newspapers of *Halifax* inviting purchasers to the said auction; that the proponent was one among the bidders at the said auction, and being the highest bidder for the said ship and cargo, did purchase the same of the said *Charles Hill & Co.* for the sum of £.41,671 19*s.* 4*d.* and received from him *a bill of parcels of the said purchase in the name of the said Charles Hill and Co. as auctioneers, and not as persons acting under the authority of this worshipful court, as appears by the said bill of parcels hereunto annexed*, and the proponent humbly submits that the said *Charles Hill & Co.* alone can be entitled to enforce the payment of the said £.41,671 19*s.* 4*d.* so bid by him for the ship *Herkimer* and cargo as aforesaid. This proponent therefore humbly prays the judgment of this worshipful court, whether he the proponent is bound to submit to the jurisdiction of this court in the matter of the said monition."—"Sworn to and signed by *Andrew Belcher*."

In arguing upon this protest, it was assumed by counsel that the contract of sale was made merely with the auctioneer, and the sale itself not under the authority of the court of admiralty; I do not think it at all material to the case, but the facts will not bear them out in this assumption. The advertisement in the public papers expressly stated the sale to be made by

the authority of the court of admiralty; the bill of parcels, annexed to the protest, is headed "*Andrew Belcher*, esq. bought of *Charles Hill & Co. at Admiralty sales;*" and it is to be observed that Mr. *Belcher* has not sworn positively that he *purchased* the goods of Messrs. *Hill & Co.* merely as auctioneers, and not as persons acting under the authority of the court of admiralty, but that Messrs. *Hill & Co.* had so stated themselves in the bills of parcels.

But admitting the fact in its fullest extent, still there is nothing upon the face of the monition itself, or in this protest which can oust the court of its jurisdiction. The respondent is monished to pay a certain sum of money which is alleged to be the proceeds of the ship *Herkimer* and cargo. Upon that allegation the jurisdiction of the court is founded. Mr. *B.* admits that he is in possession of those proceeds. Whether he purchased them at public auction, whether he may be answerable for the amount to Messrs. *Hill & Co.* is perfectly irrelevant, for the stubborn fact still remains unshaken, that the respondent is in possession of the proceeds of this ship and cargo. Whatever matter therefore may be pleaded in answer to the monition, the admitted fact is sufficient to found the jurisdiction of the court; which has the exclusive cognizance of prize, and the proceeds of prize, with all incidental questions which may arise.

The court will naturally feel some degree of delicacy in discussing the subject of its own authority. It affords, therefore, a considerable degree of satisfaction, that it is able, not to rest the point upon its own assertions, but rather, to refer to the decisions of other courts of justice, those of *Westminster Hall*, and in cases of prohibition.

The solicitor general quoted a *dictum* of lord *Kenyon*, in the case of *Smart* v. *Wolff*, in support of this protest, "that if the legal property in prize goods was altered, as by sale *in market overt*, the court of admiralty might no longer have jurisdiction over them." In the first place, this mere *obiter dictum* of that eminent judge, expressed too with some hesitation, was not admitted by another judge upon the bench of no less respecta-

bility, Mr. Justice *Buller*, who doubted, supposing the plaintiffs *had* obtained these goods under a legal title, under which "they might have retained the possession, whether that circumstance would be a ground for prohibition." Supposing, he says, that they had obtained the possession of them in market overt, or under any legal title, still I think a prohibition ought not to be granted on that account, "because," he adds afterwards, "that he does not see why they could not defend themselves upon that plea in the admiralty, as well as in other courts."

But, secondly, to make this *dictum* applicable to the present case, it should have been a monition to call in the ship and cargo themselves. Had a monition to that effect been directed to a person who had *bona fide* purchased them at public auction, whether under the marshal's authority, or in the common course of trade, the party might have availed himself of lord *Kenyon's* opinion, as far as it was valid; but this is a monition not to call in property sold in market overt, but the price, the proceeds of that property so sold, and which are admitted to be in the parties' hands.

Upon *that point*, this case of *Smart* and *Wolff* is decisive. It was there adjudged, that the court of admiralty has the power, which it has repeatedly exercised, of issuing monitions to require persons to bring in so much of the proceeds of prize as remains in their hands, *as having the possession of the proceeds by whatever means they may have been obtained.* "The proceedings in that case were said by judge *Buller* to have been founded on the plaintiff's *having the possession of the proceeds*, in which character they are amenable to the court of admiralty."

In the case of the *Danish* ship *Noysamhed*, 7 *Ves. junr.* 593, a prohibition was moved for upon grounds something similar, though still stronger, than what is stated in this protest, and have been argued so warmly by the advocates, namely, that the contract was with the auctioneer, mere matter of account with him, and perhaps settled. A cargo was condemned by the vice admiralty court at *Tortola*, was sent to *Chorley* at *Liverpool*, and was sold by him for the benefit of the captors. The court of appeals reversed the sentence and decreed restitution. A

monition issued against *Chorley* for the proceeds. He moved for a prohibition on the ground that the property was consigned to him, *not as a prize agent, but as a general merchant, and that he had since accounted for the proceeds to the consignors*, but the lord chancellor thought *that* a question proper for the court of admiralty to decide, as incidental to the principal question of prize; and that therefore he was not authorized to grant a prohibition.

In a subsequent case, *Willis* against the Commissioners of Appeals in Prize Cause, *East.* 5. 22, it was thus laid down by lord *Ellenborough*, "It is clear that the court of admiralty has jurisdiction *in rem*, and may take into its possession the thing itself, *or the proceeds wherever they may be found, either in the hands of the principal captor, or agent, or of any other*, who has no lawful title to hold them." And justice *Laurence* adds, "it is supposed that the prize court has jurisdiction over the agent only under the prize acts; but that is not so; for, if those acts had never been passed, that court would have had jurisdiction over the *res*, and the proceeds of it, *into* whatever hands they get."

These cases clearly show, that the jurisdiction of the court of admiralty over prize, and the proceeds of prize, wherever they may be found, and under whatever title they may have been obtained, is almost without limit or control, and that the grounds stated in the protest, and in the arguments adduced by the gentlemen at the bar, are not founded in law; and I therefore overrule the protest.

The monition then having been issued within the proper jurisdiction of the court, the respondent is bound to comply with the requisition contained in it, either by paying the money or showing cause why it should not be paid. This he has done in his answer and return upon oath.

In this he states "that a proposal was made by the claimants after condemnation to purchase the ship and cargo from the captors; after much negotiation the captors consented to sell the same to the claimants for £.24,000 *Halifax* currency. That captain *Henry Whitby* who captured the ship, told the

respondent that he would prefer taking £.24,000 to the receiving the proceeds three or four years afterwards. That in consequence, captain *Whitby*, his officers and crew, unsolicited by the respondent, and without consulting him, executed to him a special *letter of agency*, authorizing him on their behalf to sell the said prize, subject to all incumbrances, for £.24,000, ratifying whatever bargain or agreement the said respondent should make, provided he obtained the said sum of £.24,000 to be divided to the captors without deduction. That in consequence he agreed with *Edward Griswold*, one of the parties in the claim, who was fully empowered by all the other claimants, to sell the same for the aforesaid sum together with every expense which had or might occur, upon condition that he should engage on behalf of said claimants to discontinue and withdraw the appeal; and the respondent and *Edward Griswold*, did, for and on behalf of their respective constituents, conclude the aforesaid *bargain of sale.*

"That when the parties were about to carry the said agreement into effect, *John Poo Beresford*, esq. on whom as senior officer the command of his majesty's ships devolved, claimed as flag officer one eighth part of the said prize, and, upon his asserted interest, objected to the agreement, and applied to this court to prevent the same from being carried into effect, whereby the said agreement was prevented from being completed, and the captors became involved in a legal controversy. But the captors being of opinion that captain *Beresford's* claim would never be admitted in a court of law, and the agreement beneficial to them, expressed their desire to carry the same into effect, and to put an end to the controversy notwithstanding; and for that purpose moved the court for an order for the sale of the ship and cargo; and it was agreed by the respondent and *Griswold* that the respondent should purchase ship and cargo at public auction for the purpose as aforesaid, and that he should hold the property so purchased to the amount of £.24,000, and the captors' expenses, and that the remainder should be held by the claimants.

"That the ship and cargo were accordingly put up to auction, and purchased by the respondent for £.41,671 19*s.* 4*d.* and he believes if he had not bid they would not have produced much above £.36,000.

"That he would not have been concerned if he had apprehended that it would have been required of him to pay into court the proceeds; the particular object being to carry into effect the agreement.

"That after the sale the respondent retained of the cargo to the amount of £.24,000, and the remainder was delivered to *Edward Griswold* upon the express condition that the same should be refunded in the event that the sale made by him could not be carried into effect, and that it should finally be determined that the appeal should be prosecuted.

"That the respondent considers himself responsible to the captors for £.24,000, and bound to pay whenever all the difficulties which prevented the final execution of the agreement should be removed.

"That a part retained, the bark and copper, amounting to £.17,747 19*s.* was sent to *London* and insured. The 16th *December*, 1806, he shipped the bark in the *Yarico*, which was captured. On the 13th *February*, 1807, he shipped the copper in the *Trusty*, which was lost; she sailed 21st *February*. That he is advised that it will be impracticable to recover from the underwriters until he receives a certificate of the customhouse at *Halifax*, dated one year and a day from the sailing of the vessel, that she had not been heard of.

"That the parties proceeded to carry the agreement into effect. The opinion of sir *J. Nicholl* was taken, who declared the aforesaid agreement could be validly carried into effect, after giving due notice to the parties who had not assented.

"That a meeting was held, and that it was agreed that captain *Whitby* should give indemnity against captain *Beresford's* claim and others. That he believes that all difficulty has been removed; that *Griswold* directed *James Stewart*, esq. to withdraw the appeal whenever the agreement could be carried into effect, and which he is ready and willing to do, and the captors

and claimants are satisfied and content the property should rest and remain as it is; and captain *Beresford's* agents are likewise satisfied.

"That the respondent owns property, free from debts, to a larger amount than £.24,000, and has property sufficient to pay £.41,671; but it would be highly detrimental if not ruinous to him to be compelled to pay either of the said sums into court, when he has received but a small part; that he has not derived the smallest advantage from this transaction; and that it would be grievously oppressive upon him to enforce obedience to a monition which no person interested in the said prize, or any part thereof, wishes should be enforced against him."

Upon this answer, as was properly stated by the counsel, two questions arise, 1st, Whether there was any thing illegal in the agreement of sale between the captors and claimants. And 2dly, Whether the court had any right to interfere.

In considering the first question it is necessary to ascertain precisely in what situation the respondent stands before the court; since that situation has been represented by his counsel in a variety of different lights.

If he is to be taken as *a mere purchaser*, as was sometimes stated in the arguments, the whole of the answer is perfectly irrelevant. For from the moment the purchase at auction was complete, the ship and cargo were the absolute property of the purchaser, to dispose of in what manner he pleased; nor is the court in the least concerned in any subsequent transactions: but then the respondent, the same as any other indifferent person, is liable to pay the price, according to the conditions of sale; and no legal defence can be set up against the payment.

But it appears from this answer, and the arguments of his counsel, that the respondent does not place his case upon that footing. He states himself to have been an agent, authorized by captain *Whitby*, and the crew of the *Leander*, to sell to the claimants in this case, the *Herkimer* and her cargo, for the sum of £.24,000 and the charges; that the sale made by Mr. *Hill* was only an amicable sale, merely between the parties to

ascertain the value; that the parties never intended it to be a real sale, but a mere form to enable them to carry the agreement into execution; that the respondent therefore, the nominal purchaser, was not liable to be called upon to pay into court the proceeds of that sale, but was answerable only to the captors, and for the sums which they had deposited with him in consequence of these agreements, namely, the £.24,000 and the surplus for expenses, after *Griswold's* £.9,704 were deducted; and which £.24,000, together with the surplus, were in reality the sum, or price, which *Griswold* had paid the captors for the *Herkimer* and cargo, under the *bargain and sale.*

A great deal of argument has been used to prove the legality of compromises. It does not seem to me to have any thing to do with the present question. Compromises no doubt have been, and may still be made. Parties may recede from their rights, may desert their appeals, and may dispose of their interests, whether present, or only remote, or contingent, upon any terms or conditions they choose; but the real question before the court upon *this* defence is, whether the captors have such a vested interest in the prize itself, or the proceeds of the prize, in the present stage of the cause, that they can take possession of them, and alienate them, without any authority from, and in defiance of, the court of admiralty.

I must own I have my own private opinion upon compromises: that they are making a *job* of war, not very honourable to the nation, and bad policy in the end for the navy themselves; and many high and eminent persons have entertained the same idea. But that is only my own private opinion; and I am certainly not disposed to throw any impediment in the way of a compromise, when conducted in a legal, justifiable, manner, and the parties think it for their interest; as I trust I have ever endeavoured to promote the real good and advantage of the service, as far as was consistent with an impartial performance of my duty. But I cannot but resist an attempt in parties to take the whole law into their own hands, and to wrest prize property out of the legal custody of the court.

If this power of attorney, and the agreement founded upon it, were merely *executory*, and to operate only after final sentence, as was contended by the king's advocate, I do not see how they could at all apply to the present state of the case; they cannot be any authority to the respondent to keep possession of, or to dispose of, capture or proceeds, until the time arrives when they are to become operative. They cannot, as powers from the captors, or as agreements with the claimants, justify an intermediate possession, or disposal of the capture or proceeds; unless he has a right to such possession, or to make such disposal, from some other quarter.

But I think it is pretty evident, that this power, and agreement, are in *verbis de præsenti*, and have been actually *executed*, as was admitted by the king's solicitor. Such was clearly the intention and understanding of the parties. The respondent was in possession of the ship and cargo. He says in his answer, that "he and *Edward Griswold did conclude the bargain and sale*." It was actually carried into effect, for the respondent, retaining in his own hands a part of the cargo to the amount of £.24,000, and upwards, as an equivalent for the purchase money which *Griswold* was engaged to pay, delivered the vessel, and the remainder of the cargo to Mr. *Griswold*. There was indeed an agreement, that in case the former agreement could not be carried into effect, that *Edward Griswold* should refund the sum of £.9,704, 10*s*. but the sale subject to that sort of contingent defeasance, was nevertheless actually made and completed as a present transaction, by delivery of the goods, and the payment of the price.

The question then, whether this is a legal agreement, or, in other words, whether the parties had a right to sell the ship and cargo to the claimants, in the present stage of the cause, depends upon these points:

1st, Whether captors have a *disposable property* in things captured, or the proceeds of them, before final adjudication. And what is the final adjudication.

2dly, If they have no disposable property, it will be necessary to consider who is entitled to the *custody or possession*, of

captures and proceeds until that period. And how that right of custody or possession is to be exercised.

Upon the first point it must be observed, that even after final sentence, and condemnation, it is far from being clear and certain that the captors would become entitled to the whole or even any part of the capture.

1. It is possible that the crown might claim the *whole* of this prize. By one clause of the prize act, it is enacted that upon proof of the breach of any of his majesty's instructions relating to prizes, or of any offence against the law of nations committed by the captors in relation to any prize, or the persons taken on board the same, the prize shall be condemned to his majesty's use and disposal. *Sec.* 32. *Prize Act.*

By another clause, *sec.* 20. it is enacted, that in case any ship or goods shall be taken and restored by the commander of any vessel of war belonging to his majesty, clandestinely, or by collusion, or connivance, or by consent, (unless the same shall afterwards be allowed and approved by the court of admiralty) such commander shall forfeit the sum of £.1000, and the goods and ship so taken and restored shall be adjudged as good prize to his majesty.

It is not for me to decide, in the present stage of the cause, whether such a forfeiture has been incurred. But is it clear that it has not? It is capable at least of some doubt, and argument: this ship and goods have been certainly taken and restored by the commander, and can it be said otherwise than clandestinely by collusion, connivance, or consent, since it was done by a private agreement, under colour of a sale, and was not allowed or approved by the court of admiralty? In the former part of the clause relating to privateers, the words "without being brought to adjudication" are introduced; but in the latter part, respecting king's ships, no such qualification is to be found; so that the clause applies to a restitution at any time before final sentence. Under the *direct words and apparent meaning* of the act the case does *most certainly come.* It was argued by counsel that it could not be the intention of the act to apply to *compromises.* Be it so, if the compromise, was of

such a kind that it could be legally carried into execution; as a compromise which was not to take effect until after final sentence. But would this equitable interpretation hold good, if the compromise was of such a nature that it could not be legally supported? If the captors had restored the ship and cargo before they had a right so to do?

It is certainly the *spirit* of the act to prevent connivance between parties, and restitutions without the intervention of the court of admiralty. In all other cases of compromise the parties have not proceeded to carry them into execution, until the property was legally delivered by the court, upon a final sentence of condemnation, or restitution by agreement. In *Berens* and *Rucker*, the property was not sold or disposed of; for one reason assigned for the compromise was to enable the parties to obtain a final sentence in order to sell and take advantage of the markets, when restored by final sentence, and not before, notwithstanding the agreement of the two parties, the vessel proceeded to *Amsterdam*.

But here all has been done without any intervention of the court, or final sentence obtained. Under colour of an order for sale, which the parties themselves represent as a merely fictitious, and not a *bona fide* sale merely between the parties to ascertain the value, and never meant to be a real sale, the compromise and restitution have been completed. If this does not amount to a connivance, and real restitution, I do not know what does. Nothing remains for the court to do; the parties have no occasion for any farther proceedings, they do not stand in need of any farther sentence. They have got the property, and as they have made a *private division* of it, so they may proceed to a *private distribution;* and if, according to the argument of counsel, these are the only parties interested, who else has a right to interfere? The court of admiralty and the prize cause may rest in *statu quo* to eternity; these parties have certainly no farther occasion for them, the business is as much completed, without final sentence of the court, and any cognizance in, or intervention of, the court, as if the

whole had been done at sea, the very mischief intended by the act to be guarded against.

The act does indeed speak of restorations which may be allowed and approved afterwards by the court of admiralty, but this must refer to cases of necessity, or under very peculiar circumstances; not to cases, where, without any plea of that kind, the whole law of prize has been subverted.

So far then from its being clear that a forfeiture has not been incurred, I think a very strong case might be made on behalf of the crown. So strong that I cannot but entertain very great doubts whether it is not the duty of his majesty's advocate to enter an appeal on his behalf against the sentence of this court, or even of the court itself to direct such an appeal to be entered, and prosecuted in the court of appeals. Since it is incumbent both on the court itself, and his majesty's officers, whenever any apparent interests of the crown arise, to intervene on behalf of the crown, and bring them forward, to place them in a train for discussion, and if well founded to give them effect.

It is not in that view however that I *now* refer to these clauses in the act; but merely to show that it is extremely possible that, in consequence of these very transactions, the parties may have no interest whatever in this capture, either present or future.

If this claim of the crown is well founded, it is liable to be barred by no time, or limitation whatever. In the case of the *Clarissa*, before the lords, 20th *July*, 1799, the admiralty intervened as in a case of forfeiture to the crown, on account of malfeasance by the captain. An appearance was given by the captor, under protest, upon three several grounds, 1st, that the captor should first have been proceeded against criminally; 2d, that the time of appeal had expired; and 3dly, that distribution had taken place. The protest was overruled by the court on all these points; and it was held that the limitations in the act apply only to the question of prize or no prize, or between captors and claimants, and do not bind the crown as against the captors; and that the crown can be guilty of no *laches*.

2. Other persons besides the actual captors, may be entitled to *share:* vessels may have been in sight, which may hereafter claim as joint captors. It is usual for joint captors not to assert their interest until after final condemnation.

I shall say nothing respecting the claim of commodore *Beresford*, or other persons, to the flag-eighth, since it has been stated, though without any documents, that no opposition will be made from those interests. But the power of attorney itself was not signed by the whole of the officers and crew, who are therefore not bound by it.

Greenwich hospital has two different claims upon the proceeds of prize, by the *46th Geo.* III. *C.* 101, it is entitled to £.3 6*s.* 8*d.* per centum, on the net proceeds of every prize. This claim is paramount to any prize act or proclamation.

By the marshal's return of the commission of sale, it appears upon the records of this court, that the gross proceeds of this prize were £.41,000, after deducting all necessary charges. May not the hospital be entitled to a per centage upon this sum?

By the prize act, *Greenwich* hospital is entitled not only to all unclaimed shares, but to all unpaid balances of the proceeds of prize, which shall remain, after distribution shall have commenced, six months. It will appear in the records of the court that those proceeds are £.41,000, deducting charges, and that they are in the hands of the agent. If, according to these agreements, the captors shall divide only £.24,000, will not *Greenwich* hospital have a right to demand the residue as an unclaimed balance?

I have now shown that there are actual, contingent, and possible interests in the proceeds of prize, besides those of the captors, even to the extent of totally annihilating the captors' rights; and, consequently, that the captors can make no disposition or alienation of the capture, even as to the future contingent event of condemnation, by which those other actual, contingent or possible interests may be affected; nor can any agreements between the captors and claimants inure to the defeating of those interests, which will still have a lien upon

those proceeds, to the full amount as they appear upon the records of the court, according to their respective extent.

As to the *present interest*, nothing can be more certain than that *before final condemnation* the captors have no legal interest in the capture at all; nothing which they can by any possibility convey to another, either in the name of a compromise, or of any other denomination, and that in case of an appeal, the first sentence is not the final sentence, but the ultimate decision upon the appeal.

This is too clear to admit of a doubt. It is a question which has been most accurately examined, and deliberately settled in some of the most solemn decisions, which have ever taken place in the *British* courts of justice; ships and goods, taken as prize, belong to the crown, as the representative of the nation; no subject has any right to them but by express grant from his majesty. Those grants are subject to any restrictions and limitations, which his majesty thinks proper to make. What is not expressly granted, or comes within any limitations or restrictions in the grant, is an interest still remaining in the crown. The captors' title deeds are the king's proclamation, and the prize act. The proclamation directs that prizes may be lawfully sold or disposed of by captors and their agents, *after the same shall have been to his majesty finally adjudged lawful prize*, and *not otherwise*. By the prize act, the whole interest and property is given to the captors, expressly "*after the same shall have been adjudged lawful prize to his majesty*." The interest in prize, therefore, before final condemnation, not having been granted to the captors, still remains with his majesty.

These are not mere abstract and theoretical doctrines, and the interest of the crown a fiction of law. It is a real disposable interest, and accordingly in the case of the *Elzebé*, *Maas*, (5 *Rob.*) it was decided, "*that the crown can* release ships and goods that have been taken *jure belli* before adjudication, without the consent of the captors."

These points were the subject of discussion in the case of *Home* v. lord *Camden*. Few cases were ever more frequently and deliberately argued. The action was first brought in the

court of common pleas, from thence it was removed by appeal to the court of king's bench, and finally by writ of error to the house of lords. It was there referred to the twelve judges, who delivered their unanimous and elaborate opinion by lord chief justice *Eyre*. (*H. Blackstone* II. *p.* 533.) After recognizing the general doctrine that the interest and property "do not vest until after the same shall have been finally adjudged lawful prize to his majesty, "lord chief justice *Eyre* proceeds to state, "that the effect of an appeal is to suspend the force of the sentence. From the moment of the appeal being interposed, the sentence is no longer *final;* on the contrary is liable to be reversed in part or in whole." After arguing this point at length, he concludes, "your lordships will see how perfectly inconsistent with the plan of the prize act this notion of the interest and property vesting in the captors, at any time before the final adjudication in the court of appeal, will be found to be. In truth, so far from the interest and property vesting at an earlier period, the legislature, by the words, seems to have cautiously guarded against its being so understood."

But the decision in that case does not rest even here; after settling that the captors had no interest, it proceeds to consider particularly the power of agents over captures and proceeds.

"If it be the true construction of the prize acts, that no interest or property vested in the navy, until after the final adjudication by the commissioners of appeals, it follows that the agent's proceeding to sell soon after the sentence in the admiralty court, must be without colour of authority. In this stage of the proceedings, the agent could only act under the authority of the prize court; and in the manner in which such agents usually do act. Acting *under* the authority of the prize court, they would be to *account* to the prize court; acting *without the authority of the prize court*, they would be in the condition of mere *strangers*, who had *possessed themselves of the proceeds of a prize*, to whom it is admitted, a monition might and *ought* to be issued, to compel them to bring in proceeds." He goes on to state, that "agents, though perhaps they may be *appointed*

before the final adjudication of the prize, have nothing to do until after the final adjudication has taken place, that all the different sections of the prize act, which give powers or impose duties upon agents; all respect *sales in order to distribution.*" "The result of these observations is," says lord chief justice *Eyre*, "that that whole case, (and I think *I* may add the whole of the present case) rests upon two fundamental errors; the first, that an interest and property *vested* in the navy as captors, long before it could by any possibility vest; the second, that the navy agents had authority under the prize acts to take upon themselves the *management* and *disposition* of the prize long before such authority could be derived to them."

This case then being decisive that captors have no interest or property in prize, and that agents have no right to sell until after final adjudication, it follows that an agreement entered into by them for the sale of a ship and cargo to the claimants, before that period, is not a legal or valid agreement.

2dly, Had the captors then any right to the possession of the ship and cargo, or of the proceeds; and therefore under cover of a legal possession of the one or of the other, might give effect to the agreement?

This leads us to the next point proposed, namely, who is entitled to the custody or possession of prize until final adjudication? and how it is to be exercised?

This question in general is answered by the same high authority. Lord chief justice *Eyre* says, in the same case, "I take it to be clear, and it was so stated by the civilians in the case of *Smart* and *Wolff*, (3 *T. R.* 323.) that pending a suit in the prize court, the ship and goods are in the custody of the court; the interests of all who are concerned in the capture, are under the protection of the court."

The manner in which the court is bound to execute this trust imposed upon it, depends chiefly upon the respective prize acts: I say chiefly, because it is well known that "these acts form a portion only of the law of prize, and that a great part of the admiralty jurisdiction is founded on the established usage and common law of that court."

In *the high court of admiralty*, captors are left in possession of the capture until final sentence, unless it is taken out of their hands by the court; usually in two cases, that of *delivery* upon bail, and of a *sale* under a perishable monition, upon farther proof, or sentence and appeal. Even *there* upon every sale the proceeds are taken out of the captors' possession and are remitted by the commissioners to the registrar of the court of admiralty, to remain until final adjudication.

In the courts of *vice admiralty* a different mode is pointed out by the acts of parliament. At the very commencement, the prize is taken out of the captors' hands, and the marshal, to whom the officer of the customs is added by the prize act, takes the vessel and cargo into his custody. Being once in the custody of the court, neither the prize itself, nor the proceeds arising from the sale of it, which are the representative of the prize, can be taken out of, or retained from, that custody, but by the authority of the court itself, or the superior court of appeals.

The prize act, in case of appeal, first provides that the execution of the sentence appealed from shall not be suspended in case the party appellate shall give security for the full value of the ship or goods: 2dly, captures may be delivered either to captor or claimant upon giving security for the full value thereof.

In both these cases, the only cases in which *the act directs the delivery of captures to the parties*, security is to be given for the full value.

We come now to the third case provided for by the act, that of a sale. "If there shall be any difficulty or sufficient objection to giving security, the judge shall, at the request of either of the parties, order such goods and effects to be entered, landed and sold by public auction, under the care and *custody* of the proper officers of the customs, and under the direction and inspection of such persons as shall be appointed by the claimants and captors."

How the proceeds of sale are to be disposed of is the next question. There are two acts which direct the court upon this

head, the one enacts what shall, and the other what shall not, be done. The prize act says positively, " that the moneys arising from the sale *shall* be brought into court, and by the registrar *shall* be deposited in the bank of *England*, or, (in case the captors and claimants shall agree thereto) in some public security at interest, in the name of the registrar and of such trustees as the captor and claimant shall appoint." The other act, *41st Geo.* III. *c.* 96, which is a perpetual act, and expresly confirmed by the prize act, says, " Whereas it is expedient that the proceeds of property captured and converted by sale should be secured until final adjudication; be it enacted, that *in all cases* when a commission of appraisement and sale is granted by the judge of the vice admiralty court before *final sentence*, the proceeds of such sale shall *not remain in the hands of the captors or their agents*, *but shall* be brought into the registry of the court, and remain subject to the farther orders of the court until final sentence."

The cautious, systematic, and well considered regulations of the acts, with the practical interpretation of them by prize courts, for the safe custody of the property is very observable. The capture itself is either in the custody of the law, or it may be delivered to the parties upon sufficient security; if sold, the proceeds must be left in the registry in the actual custody of the court, or placed in the public funds in the name of the registrar, and consequently still in the protection of the court: these are the only alternatives, no power is given to leave the capture in private hands without security given, or the proceeds in any case whatever.

Which of the courses prescribed by the act have been followed in the present case?

The ship and cargo were not delivered to either of the parties upon bail, because sufficient securities could not be found.

Upon the joint motion of both parties the other alternative was adopted: it was sold under a commission from the court.

An argument was advanced by the king's advocate, that " this sale was not made under the authority of the prize act, or in conformity to the regulations prescribed in it, and that

the agent could only have been answerable for the proceeds if the commission of sale had been directed to him."

If the fact were as represented, still the conclusion would not follow, because, as proceeds of prize, which they are admitted to be, however acquired, they are liable to be called in, unless the party can show a legal title to retain them.

But the proceedings in this respect have been perfectly regular, and conformable to the prize act. It was said by the king's advocate, that the sale ought to have been made by the prize agent, under the 53d section of the act, which directs that " all appraisements and sales shall be made by agents appointed by the flag officers, &c." This clause has received a judicial interpretation in the case I have so often referred to, *Home* against lord *Cambden*, where it is expressly held to relate " to appraisements and sales after final adjudication" only.

It was then said that the ship and cargo were not " sold under the direction and inspection of such persons as shall be appointed by the claimants and captors," under the 52d clause. The act does not direct the sale to be made by such nominees, *that* by the usual course and practice of the admiralty is done by commission to the marshal. The parties have a right if they choose to exert it, that the sale shall be conducted under the direction and inspection of such persons as they shall appoint, but if no such persons are appointed they must be taken to have waived their right; and since the sale took place upon a joint motion of the parties that the property should be sold by the marshal, *he* may in some measure be considered as their nominee to direct and inspect the sale.

The sale then was conducted in the usual manner: In virtue of the commission directed to the marshal the ship and goods were advertised as being to be sold under the authority of the court of vice admiralty, they were put up to auction, by Messrs. *Hill, & Co.* and were knocked down to the respondent as the highest bidder.

Upon this review of the prize acts, it appears that as to the *right of possession* the parties could only acquire the possession of *ship and cargo* upon *bail*, or as *purchasers*. They were not

entitled to it upon *bail*, as that mode was found impracticable; if they acquired it as *purchasers* they are answerable for the purchase money, as before stated. And as to the possession of the *proceeds*, they are not entitled to it, either as parties, agents, or purchasers, *in any case whatever*, but are bound to pay them into the registry.

Right, then, the parties having none, how can the court be justified in allowing the respondent to retain the proceeds, contrary to prize acts, for the purpose of effecting an agreement which in itself is substantially illegal, and to support arrangements which the parties had no power whatever to make?

This brings me to the second question, made by counsel.

It is farther pleaded in the answer, " that the captors, and claimants, and the agents of captain *Beresford*, are all satisfied with the security they now have, and are willing to allow the property to remain where it is at present."

Not only no power or authority whatever is given to the court to permit proceeds to be lodged in private hands, but the words of the act are very positive against it; " that the proceeds *shall* be paid into court, and *shall not* remain in the hands of the captors' agent." How then can any consent, or acquiescence amongst the parties, set aside a positive direction to the court.

No such power is given them by the act itself, but the direct contrary may be infered from it. Certain things are allowed to be done " *in case captors and claimants shall agree*," such as that, proceeds may be placed in public security at interest, instead of the bank: in another clause that " property, with the consent of captors and claimants, may be sent to *England* for sale." But if captors and claimants, *by their joint consent*, could dispose of proceeds in a different manner from what the prize acts direct, these clauses, empowering them to make a particular disposition in certain cases, would be totally nugatory. The introduction of these clauses is therefore complete proof, that, in the opinion of the legislature, claimants and captors, by their joint consent, can make no disposition of

captures' proceeds, other than such as the prize acts have directed.

So with respect to delivery upon bail. There is no point upon which it should seem that parties might be more safely trusted to agree than upon the sufficiency of the securities. Yet here the competence of the bail is not left to the mere acquiescence and satisfaction of the parties. A warrant is always directed to the marshal to inquire into and report the sufficiency of the security proposed. How then can it be contended that the consent of parties can justify the court in leaving this property without any security at all?

How little latitude is given by the acts to parties *jointly agreeing* as to the disposition of proceeds. They have only their choice between the bank of *England*, and other *public security*. This joint consent gives no power of making any other disposition; and even then the proceeds are still in the custody of the court; for the property stands in the name of the registrar, as well as of the other trustees. How then can this consent be an authority to the court, to suffer property to remain in the possession of private persons?

For who are these parties who assume a right to authorize the court to permit this property to remain in private hands, and without the security required by the acts? They are parties, who, as has been already proved, have no legal interest or property in the capture whatever. It was because the captors and claimants have not the legal interest that the custody and protection of the property are vested in the court of admiralty. These regulations and restrictions in the prize acts were made as much against captors and claimants, and their agents, as any other persons; to prevent collusions, embezzlements, and other unfair practices, and most particularly to prevent captors from fraud, or loss of property, by their agents. Shall parties then come in and say, *we* are willing to dispense with acts of parliament made against ourselves; *we* desire to divest the court of admiralty of that legal custody and protection, with which the law has intrusted it exclusively, and as against ourselves. And for what purpose is this consent, and acquies-

cence of the parties entered into? To carry into effect an illegal agreement, and to dispose of property to which they have no right or title whatever.

It has been farther urged, that since the parties are quiescent, the court has no *right* to proceed *ex officio*. Admitting that the court was acting merely *ex officio*, in the present case it was competent so to do.

I shall first consider the objections made to this power by the king's advocate, from the prize act. In several sections of this act, security was to be required, or proceeds called in *at the request of parties*. In section 62d, in case of condemnation, where there is *no claimant*, in the vice admiralty court, the judge may compel the agent to give security, at the *requisition of the captor*. In clause 63, in cases likewise where there is *no claim*, the proceeds may be vested at *the prayer of the captor*. In the 64th clause, the judge of the high court of admiralty, at the time of serving the inhibition, or at any time pending the appeal, shall assign the agents or other persons in whose hands the proceeds may have come, to bring them into the registry, *at the prayer of either party*, or of the treasurer of *Greenwich* hospital. The 65th clause gives a similar power to the court of appeals. It was admitted that these provisions mention only cases of no claim, causes in the high court of admiralty, or in the court of appeals, and do not verbally comprehend cases where there *is a claim*, in causes in the courts of *vice admiralty;* but it was argued that the same *spirit* must be extended by *analogy* to *these* cases likewise. The inference is certainly to be drawn the other way. When those other cases and courts are by name mentioned, these clauses cannot be extended to cases and courts not at all mentioned, and which therefore the legislature must be supposed to have intentionally excluded from the operation of those clauses. But in the clauses of the acts under which *these* proceedings took place, and which *do* relate to the case of claims in the vice admiralty court, expressly no such restriction, as "*at the request of parties*," is to be found at all. They say categorically, "the proceeds shall not remain in the hands of captors or their agents,

but shall be brought into the registry of the court." They do not require the court to wait for the application of the parties, but positively direct the thing to be done, and consequently impose it as a duty upon the court.

It was laid down expressly by sir *William Scott*, in *Smart* and *Wolff*, that courts of admiralty have generally the power of proceeding to compel the payment of proceeds, "as well *by the act of the court, ex officio*, as on the application of the parties interested," (3 *T. R.* 329.) He stated it *arguendo*, indeed, but as a settled incontrovertible doctrine, and which was neither disputed by the opposite counsel, nor denied by the court; and as a power which is frequently, and notoriously exercised.

And indeed the courts of admiralty from their very constitution must necessarily be invested with such a power. Those courts are the trustees, guardians and protectors of prize, on behalf of the public. The parties, neither separately nor jointly, have *the legal property* in the subject of litigation. How many cases may be supposed, in which the security of the property might demand the interference of the court, independently of the parties? Imagine fraudulent connivances between parties themselves, or, in their absence, amongst their agents, to the injury of captors and claimants themselves, unforeseen circumstances by which proceeds might be endangered without parties or their agents having it in their power to make application, or not feeling an interest so to do. In these and many other cases which might be conceived a power of proceeding of its own authority is absolutely necessary to enable the court to execute the solemn trust reposed in it, for the security of prize property. This custody, and the want of property in the subject of litigation in the parties, create a great difference between the constitution of courts of admiralty and all other courts. A trust and custody imply the possession of powers to execute them.

The only question then is, whether this power has been properly exerted. Proceedings, *ex officio*, must necessarily be governed by the discretion of the court. I agree with the king's advocate, that this discretion ought not to be a mere

capricious exertion of authority, but a legal discretion, proceeding upon solid grounds. I conceive then,

1st, That the *positive directions of the prize act* are of themselves a sufficient legal foundation for the proceedings of the court.

2d, When the respondent says "that he stands ready and willing to do any thing which any of the parties interested have a legal right to require him to perform," he does not place the business upon a right footing. He is debtor not to the *parties*, but to the *court;* since the property was in the legal custody of the court, and the sale made by its officers. The court must look to the security of the property. I can have no doubt of the respondent's competency; he has sworn that "he has property sufficient to pay the whole sum." But that is not the question. The court must proceed upon general principles. It is not asked whether A B or C are responsible men, but whether the court, without authority and without security, can justifiably leave property to an immense extent in *any* private hands. The opinion of the commissioners of naval inquiry, in their fourth report, to the house of commons, was very decided upon this head; they strongly reprobated it as an abuse that agents should have the use of the proceeds of prize in cases of appeal. It sets, they observe, his interest at variance with his duty. The property is in many instances too great to be trusted to an individual, especially if that individual be engaged in trade; and most of the prize agents abroad are merchants: they are tempted to speculate upon it; and we find that some of the most considerable among them have failed at different periods for very large sums. The principal agency house in *Jamaica*, which is said to have been concerned in nine tenths of the captures carried into that island during the last war, amounting in value to about £.2,143,000 sterling, has been very lately under pecuniary embarrassments," *p.* 262.

Under such an authority can the court be blamed for using some little caution? No power whatever is given to the court to leave proceeds in the hands of purchasers or agents; in case of the failure of those purchasers or agents, as no security is

given, where is the court to look for the property? And what is to shield the court and its officers from the imputation of a neglect of duty? Not the acts of parliament, for they would have been guilty of *laches* in not enforcing them; not an agreement between the parties, which, as respecting the proceeds, are illegal and void. The court must look to possibilities; individuals may exercise a discretion, and may run risks, but a public body, acting as a trustee for the public, must go upon certainties. It would be wanting in its duty to itself if it did not reduce these proceeds into its own possession, and to the crown, in whom the present legal interest vests, and which the court is bound to interfere for the protection of.

3d, The manifestly hazardous situation of the property itself, from other quarters, in addition, would be a still stronger impulse upon the court. A war between *Great Britain* and the *United States* was daily apprehended; this province was threatened with an immediate attack; allowing every merit to the brave defenders of the country, it was not impossible that it might be taken by the enemy. In that case it was evident that nearly the whole of the prize property in the hands of individuals would be in danger of total loss.

In consequence of a requisition from the court, the marshal made a report of the state of prizes. It appeared that upwards of £.120,000 of the proceeds were in the hands of purchasers, whose time of payment had expired. It was retained by them too without any security.

The court thought it right that property to this immense amount should not be left exposed in this dangerous situation, but that, in compliance with the acts of parliament, it should be called in, and invested in the *British* funds. In so doing it thought it was exercising a sound discretion for the security of the property intrusted to it, and that it was performing its duty to the king, to the *British* nation, and to the officers and men of the squadron upon this station.

Upon these grounds the general order of the 23d of *September* was issued, directing all purchasers to pay in their proceeds. Three months elapsed, and but a small part was brought into

the registry. The order of the 29th of *December* was then made, and monitions directed against defaulters, beginning with the case of the *Herkimer*, because the proceeds in that case were of far greater amount than in any other, and because it was understood that resistance would be made to the order for payment. If the order was properly issued it was necessary to enforce it by farther process.

I have hitherto gone on the supposition that the court proceeded *ex officio*, and have shown that it had that power, and was fully justified in exerting it, under the present circumstances. But I am more inclined to think that these proceedings were not *ex officio*. They were founded upon the application of the parties. The minutes of the court appear thus in the register: "on motion of counsel for captors and claimants, stating that difficulties had occurred in procuring securities, and praying the court to direct *a sale of the property, and the proceeds paid into the registry, and to take the usual course;* the judge decreed a commission of sale." The express application of both the parties, concurred, therefore, with the regulations of the prize act, in imposing an obligation upon the court to compel the payment of the proceeds. The monition was merely in execution of the commission of sale, and in aid of the marshal, who was answerable for the proceeds of sale.

The court might indeed have proceeded against the marshal, and have committed him upon an attachment for not returning the commission with the proceeds, as in the case of the *Fortuna, Gerritts;* or the marshal might have prayed a monition against the party. But as the marshal stated to the court that he had applied in vain for payment, the court judged it expedient, and the most expeditious mode of proceeding, to issue a monition directly against the party who was in possession of the proceeds.

Little stress was laid upon one argument just stated by the counsel, that the whole cause was now out of this court on account of the appeal. On this no farther observation need be made, than that these proceedings are what are directed by the

act to take place after the appeal entered, and in consequence of the appeal.

In considering the protest and the answer, and in following the arguments of counsel in their full extent, and in every point of view, which for the satisfaction of the parties and the justification of the court, I thought it incumbent upon me to do, I have been obliged to take a wide range. To bring the whole to a single point. It is evident then that the respondent's plea, that though in *strictness of law* he may be a purchaser, under the marshal's sale, and responsible for the purchase money, yet *in justice and equity* he ought not to be called upon to pay it, because *the truth of the transaction was* that it was a present sale of the ship and cargo by the captors to the claimants, is not maintainable, because the captors had no legal interest or property in the ship or cargo to dispose of. 2dly, That, though after the sale by the marshal, the purchasers had a right to dispose of the ship and cargo in what manner they thought proper, the court is only concerned with the contract of sale, and has nothing to do with the subsequent transactions; which can therefore afford no plea for the retention of proceeds. 3dly, That the respondent has no right whatever to hold the proceeds as agent for the parties, because the prize acts give no such power, but expressly direct them to be paid into the registry. 4thly, That the respondent, therefore, stands before the court only as a purchaser, as a mere stranger in possession of the proceeds of prize, and consequently liable to the farther compulsory process of the court in case of nonpayment. I conceive too that as any other purchaser, by the law and practice of merchants, he is chargable with interest from the time of payment, which, by the conditions of sale, was fixed at six months.

However great may be the interests at stake, the present transaction in itself is a mere trifle in comparison to the real question before the court, which is not merely whether the proceeds of the *Herkimer* shall be brought into the registry, but whether the parties, or the court of admiralty, have the custody and disposal of captures before final adjudication;

whether the powers and authorities of the court shall be superseded, and the regulations of the legislature evaded and defeated, by a combination of parties. The substance of the answer, with the statements of counsel, do indeed afford a most extraordinary kind of defence. When the purchaser is called upon to pay the purchase money, we are told, that by some private understandings, unknown to and unauthorized by the court, a solemn public sale made under its authority by its own officers, and under the express directions of an act of parliament, is a mere fictitious sale, the purchasers ideal, and the purchase money returned in the marshal's account of sales a nonentity, which nobody is accountable for; and that under colour of that fictitious sale, without any authority from the court, the parties have taken possession of ship, cargo and proceeds; the law indeed says that captures shall not be delivered to parties but upon bail, upon the stipulation of two securities, who must justify in double the value, besides the responsibility of the party; and that proceeds shall not be retained in any case. By this contrivance of a sale they have evaded the prize act, and have got possession of the capture without giving any security whatever, and still claim to hold the proceeds; and it cannot but occur to the recollection of the court that the person who has thus acquired the possession without security, in open court declared himself unable to justify as *one* of the securities. Having thus, I may say, as against the court, and if their plea could be valid, *fraudulently* obtained possession, the parties have divided the ship and cargo amongst themselves, without a shadow of right or power. Such a case loudly calls upon the court to vindicate its own authority, and that of the laws.

It has been alleged, by way of a mitigatory plea, by the respondent, "that he would not have been concerned in the purchase if he had apprehended that it would have been required of him to pay into court the whole proceeds of the sale of the said ship and cargo, the particular object of the said purchase on the part of the respondent being to enable him to carry into effect the said agreement." If indeed the parties in this case had erred through ignorance, or from inadvertence,

they might justly be entitled to some indulgence; but they were perfectly cognizant of the nature of the transaction in which they were engaged. The law upon the subject has been frequently stated by this court. It has had occasion to animadvert upon former irregularities, which had taken place with respect to agreements and divisions of proceeds. In this case in particular, soon after the condemnation, when it was proposed to take the property upon bail, and when commodore *Beresford* gave in his protest against a compromise, the court at length stated the law relating to the rights and powers of parties, and their agents, over captures and proceeds. It stated them precisely in the same manner as it has done this day, and it supported its opinion by the quotation of the same great leading decisions which it has now again referred to. If, with this information and after such caution given, parties will take upon themselves to be wiser than the law, to contravene the provisions of the legislature, and to act in defiance of the court, to themselves only they must attribute the consequences.

But the respondent, though thus without lawful excuse, has thrown himself upon the compassion and mercy of the court. He alleges that though "he has property sufficient for that purpose, engaged as he is in commercial concerns, it would be highly detrimental, if not ruinous to him, to be compelled to pay the said sums into court." I hope, in attending to that plea, I do not suffer my feelings as a man to encroach too much upon my public duty; but I am unwilling to exert even the just authority of the court, to the detriment of any individual. However unjustifiably they may have acted, the court is disposed to enable the parties, as far as it is consistent with its duty, to disentangle themselves, if possible, from the difficulties in which they are involved. I have no doubt but the respondent is responsible, both now and after the final decision, to the full amount of the proceeds of this ship and cargo: the only relief which it is in the power of the court to allow is that of delay as to the time of payment.

The respondent prayed the court to receive another affidavit in explanation of the transaction before it decreed any further process, the material part of it was as follows:

"The only means which now remained to be adopted were to let the ship and cargo be sold under the authority of the court; but adhering to the purpose of compromise, the basis of which was that *Griswold* and myself should be accountable to the claimants for the sum of £.43,875 (from which would be deducted £.23,600 their part of the sum compromised) it became necessary that we should not suffer the property to be sold for a less sum; it was agreed that I should become the ostensible bidder, and as neither ship nor cargo brought the sum we agreed upon to be the true value, they were of course knocked down to me. After the sale it was agreed that as the ship could not sail from *Halifax* in any other capacity than a *British* vessel, that I should take her wholly to myself for £.2,500, which I accordingly did, and she was registered in my name by that of the *George*. The cargo was to be equally divided between Mr. *Griswold* and myself. As the bark and copper were better adapted for the *English* than the *American* markets, we determined that those articles, which composed part of the *Herkimer's* cargo, should be sent to *London* on our joint account. The cocoa, being the other part of the cargo most suitable for the market of the *United States*, it was decided should be laden on the *George* for *New York*. Upwards of three hundred tons were accordingly shipped on that vessel. Previous, however, to her sailing, I agreed to buy from Mr. *Griswold* half the copper, (being his interest in it) at 16*d.* per lb. amounting to £.4,668, and seventy five tons of his half the cocoa, at £.71 per ton, amounting to £.5,325. Thus I held an interest in the *George's* cargo, to *New York*, of two hundred and twenty tons of cocoa. I also agreed with him for a certain commission of four and a half per cent. to consign my said part of that vessel's cargo to him for sale at *New York*, he guaranteeing to me the sales and remittances. In consequence of his allowing me to ship to *London* his half the bark, to be consigned to my correspondent, and the proceeds to be under my

control, I allowed him to retain 17,400 dollars (the prime cost thereof) out of the proceeds of the *George's* cargo. The balance of the proceeds of that consignment, and the amount of sales of the ship, *Griswold* was to remit to my agent in *London*, on or before the 1st of *August*, 1807, in the event that the compromise could not, by the opinion of sir *John Nicholl*, be legally completed in the court of appeals. For the more clear elucidation of these transactions, and the state of Mr. *Griswold's* account with me, I refer to the annexed paper, by which it will evidently appear that he has under his control the proceeds of the ship and cargo, to the amount of about £.27,000."

From this affidavit, though the respondent had stated in his first affidavit that it would be "grievously oppressive upon him to be compelled to pay the said proceeds, when he had received but a very small part of the said property," it now appeared that more than three fourths of the property belonged to him, and had been sent on his own account for sale to the most advantageous markets, above a year since.

That though the respondent had stated, "that he had not derived the smallest profit or advantage from this transaction," yet that it was in reality a speculation from which the agents expected to have received much emolument; that the bark and copper sent to *England* and lost, were covered by an insurance; that by the statement in the account current, of the probable proceeds of the ship and cargo at *New York*, compared with the prices paid by the respondent to Mr. *Hill* and Mr. *Griswold*, the respondent expected to realize above £.3000 upon those sales only; that those sales having been effected, and Mr. *Griswold* charged with those probable proceeds, there was reason to believe that that part of the speculation had succeeded.

That though the respondent stated, that one principal reason for listening to the claimants' proposals was, "the great loss of interest which would arise to the captors on the proceeds of the ship and cargo during the controversy of an appeal," yet that by the mode adopted no interest whatever

would be made upon the proceeds for the benefit of the captors, as would have been the case had the method prescribed by the act of parliament been pursued, by placing the money upon public security where the accumulating interest would have paid the expenses of the cause.

And, upon the whole, that though these statements were immaterial to the points in question, yet that the facts appearing upon them rendered the principles laid down by the court still more applicable to the case.

The court however in fixing the time for payment consulted the wishes of the party himself, and, accordingly,

Decreed a peremptory monition to the respondent, to pay £.41,671, 19*s.* 4*d.* with interest, from six months after the sale, on or before the 10th day of *May* next.

THE ADVERSARIA.

No. II.

PRINCIPLES IN THE LAW OF NATIONS.] All the members of a state are answerable for the injustice of the government to which they belong, whose acts, in all legal and political consideration, are their acts.

IT has been reserved to the mischievous policy of the *French* republic to separate the governed from their governors, and to attempt a distinction in their consideration and treatment of them. But surely it is the most elementary of all principles, that every individual is bound by the acts of his government to foreign states: every subject of a state at war is, by the universal policy of all law, an alien enemy to every subject of the hostile state, and in all legal consideration is so treated. It is very true, that nations at war do, for their own convenience in keeeping in their own hands the direction of the public force, usually discourage their subjects, not specifically authorized by themselves, from engaging in acts of hostility; it is likewise true, that motives of private humanity and courtesy do, in a variety of cases, prevent the exercise of the

most indubitable hostile rights. But every man whose mind is tinctured with the first principles either of general law, or of the institutes of particular countries, knows extremely well that these are mere relaxations and exceptions arising out of other causes which do not constitute the law, but prove the contrary tenor of the law by the very circumstance of their being relaxations and exceptions. I venture to assume, as a principle, placed beyond the reach of all contradiction, that war is waged not between government and government, but between nation and nation, and the individuals of each; and that to prove this by authorities, would merely be to transcribe every book that has been composed upon the subject.

The property of individuals is legally answerable for the imputed injustice of their government.*

If the individuals of a state are in any degree the objects of war, in what other way can they be so, than in their persons and in their property? For what is war else but the infliction of evil upon the persons and properties of men for the purpose of compelling them to the observance of justice? Those sentimental writers who are perpetually preaching up the doctrine of humanizing war, seem to regard it in no other light than as a mere physical calamity, or a storm, sent by Providence; or a visitation of evil, which human care and attention is by every possible method to enervate and disarm. They forget that war is the exercise of a legal and moral right, certainly not to be lightly undertaken upon slight or dubious grounds of quarrel, but as certainly to be undertaken upon grave necessity, as the appointed means for deciding the disputes of independent communities of men; and when undertaken, not less certainly to be conducted in a manner effectual for its purposes. Till

* Professor *Schlegel* in his work upon the visitation of neutral vessels under convoy, maintains that the right of taking possession of the property of an enemy must be limited to property, which, being public or belonging to the state, is alone to be considered as hostile. *p.* 52. *Fr.*

men can find out the happy secret of carrying on a peaceable war, it must be carried on by modes of inconvenience and injury, if it can be so described, to the interests of individuals; and the force that is so employed is employed in the most legitimate direction. I should be glad to learn from this school of pretended philanthropists, what war is, when it is not permitted to carry such consequences with it. Accordingly, the great business of the maritime tribunals of the law of nations has been to decide whether the property which has been seized under an exercise of this right, does, in reality, belong to a subject of the enemy or not; and if it does, in what country is the tribunal to be found which does not immediately proceed to a sentence of confiscation, unless it is protected by the privilege of some treaty, or of some special circumstance that is legally admitted to found an exception? And if this legal practice of all civilized states, enforced by their tribunals, and recorded by all their eminent writers, does not constitute any fundamental part of the law of nations upon this subject, I should have been glad to have learned from Mr. *Schlegel* what he considers as its proper foundations.

The rights of war externally against the public enemy, in which are included all his individuals, are naturally and originally unlimited.

Primarily, and by the natural law of nations, which is nothing but the law of nature and universal justice transferred from individuals to communities, all modes of hostile violence are legally practicable; and the use of one instrument of destruction is just as legitimate as another. The practice of mankind, influenced by different considerations of humanity and convenience, has agreed in confining the ordinary operations of war within certain modified bounds; and so far as universal practice has imposed a limitation, so far that limitation is to be respected in the common exercise of hostility; though perhaps extreme cases may be put in which the original rights of self defence might warrant a recurrence to a degree of hostile ac-

tivity beyond it. Supposing, therefore, that Mr. *Schlegel* was well founded in his assertion of the fact, that the practice of land-war had abstained from the capture of private property, what effect would that have upon maritime capture, which at the same time is admitted to have been uninterrupted? the only rational conclusion would be, that the one is a legitimate exercise of war, and that the other is not: both of them natural modes of making war, but the one being for some reason or other, proscribed by the practice of mankind, whilst the other is left in full force and vigour by their common consent? Upon a subject like this, of a limitation of a right naturally indefinite, there can be no other criterion of what is legal than the common consent of the civilized part of mankind expressed by their universal conduct: a conduct not lawless and irregular, but a conduct sanctioned by their legal institutions, and regulated by their common tribunals. This is the real conventional law of mankind, about which Mr. *Schlegel* has surely lost himself in the wildest of all possible misapprehensions, when he supposes it to arise out of particular treaties. Such treaties are certainly the conventional law of the particular states between whom they subsist, but the conventional law of nations stands upon other foundations, and is to be found in the legal practice of all states not specially tied up by treaties upon that particular subject. The *practice* of civilized states is, in all cases where it is not inconsistent with natural duties, the *law* of civilized states. It is therefore not without surprise that one sees, in a book professed to be written by a person of judicial experience and learning, the authority of the venerable *Grotius*, who, in his immortal work, has described the practice of states as one of the great foundations of the law of nations, surrendered up at once and without reserve to the censures of that licentious speculatist *Rousseau*, a man born for the mischievous purpose of shaking the established opinions and practice of mankind, and whose freedom, or shall I call it audacity of thinking on many subjects, was the fruit, natural enough, of his entire ignorance respecting them.

But, how true is the assertion that private property is actu-

ally protected from land capture in war? What is the pillage of towns? What is booty? Does any man deny that these are lawful exercises of the rights of war? What is the practice of exacting contributions but a moderated and stipulated exercise of the same right; and which presupposes its existence? On what other foundation can these be defended? Or how can a contribution at land be demanded on any other principle than a ransom or composition at sea? an acceptance, in all cases, of a part where the whole was legally liable?

The fact is, that a land war is generally conducted for the acquisition of territory; the object of a sea war is the commerce of the enemy. The one naturally shows great indulgence to property; much of which an armed force cannot possibly remove; and which may be supposed to belong to persons, who from the conquest of that territory may be the future subjects of the state; whilst the very purpose of the other is to enrich the state at the expense of the enemy, depriving him of his resources of commerce, to put itself and its subjects in possession of them.

Character of an Honest Lawyer.

Justitiæ cultor, rigidi servator Honesti, in commune bonus.

Licensed August 22, 1676, *Roger L'Estrange.*

AN honest lawyer is the lifeguard of our fortunes, the best collateral security for an estate: a trusty pilot, to steer one through the dangerous (and oftentimes inevitable) ocean of contention: a true priest of justice, that neither sacrifices to fraud nor covetousness; and in this outdoes those of a higher function; that he can make people honest that are sermon proof. He is an infallible anatomist of *Meum* and *Tuum*, that will presently search a cause to the quick, and find out the peccant humour, the little lurking cheat, though masked in never so fair pretences: one that practises law, so as not to forget the gospel, but always wears a conscience as well as a gown; he weighs the cause more than gold; and if that will not bear the touch, in a generous scorn puts back the fee.

Though he knows all the criticisms of his faculty, and the nice snapperadoes of practice, yet he never uses them, unless in a defensive way, to countermine the plots of knavery; for he affects not the devilish skill of outbaffling right, nor aims at the shameful glory of making a bad cause good; but with equal contempt hates the wolf's study, and the dog's eloquence; and disdains to grow great by crimes, or build himself a fortune on the spoil of the oppressed, or the ruin of the widow and orphan. He has more reverence for his profession, than to debauch it to unrighteous purposes; and had rather be dumb, than suffer his tongue to pimp for injustice, or club his parts, to bolster up a cheat with the legerdemain of lawcraft.

He is not faced like *Janus*, to take a retaining fee from the plaintiff, and afterwards a backhanded bribe from the defendant; nor so doubletongued, that one may purchase his pleading, and the other at the same, or a larger price, his silence; but when he undertakes a business, he espouses it in earnest; and does not follow a cause, but manages it. A mollifying letter from the adversary's potent friend, a noble treat, or the remora of a lusty present from the great, has no influence to make him slacken his proceedings: for he is so zealous for his client's interest, that you may sooner divorce the sun from the ecliptic, than warp him from his integrity; yet still is his patron only *usque ad aras* (as far as just); for if once he finds the business smells rank, *St. Mark's* treasure, or the mines of *Potosi*, are too small a fee to engage him one step further.

As his profession is honourable, so his education has been liberal and ingenious; far different from that of some jilting pettifoggers, and pursemilking lawdrivers, whose breeding, like a cuckoo's, is in the nest of another trade, where they learn wrangling and knavery in their own causes, to spoil those of other men, and, with sweetened ingredients of mechanic fraud, compound themselves (though simple enough) fit instruments for villany. But his greener years were seasoned with literature, and can give better proofs of his university learning, than his reckoning up the colleges, and boasting his name in the buttery book: he understands logic (the method

of right reasoning) and rhetoric (the art of persuasion), is well seen in history (the free school of prudence), and no stranger to the ethics and politics of the ancients. He is skilled in other languages besides *Declaration Latin* and *Norman* gibberish: he read *Plato* and *Tully* before he saw either *Littleton* or the *Statute Book*, and grounded in the principles of nature and customs of nations, came (*lotis manibus*) to the study of our common municipal law, which he found to be *multorum annorum opus*, a task that requires all the nerves of industry; and therefore employed his time at the inns of court, better than in hunting after new fashions, starting fresh mistresses, haunting the playhouses, or acquiring the other little town accomplishments, which render their admirers fine men in the opinion of fools, but egregious fops in the judgment of the wise.

In his study, he traffics not only with the infantry of epitomes, abridgments, and diminutive collectors in *decimo sexto*, but draws his knowledge from the original springs, digesting the whole body of the law in a laborious and regular method, but especially aims to be well versed in the practice of every court, and rightly to understand the art of good pleading, as knowing them to be the most useful to unravel the knotty intrigues of the cause, and reduce it to an issue; yet hates to pester the court with *circuities*, *negative pregnants*, *departures* and multiplied *inconveniencies*.

He never goes about with feigned allegations to cast a mist before the eyes of justice, that she may mistake her road, and assign the child to the wrong mother: endeavours not to pack a jury by his interest to the under sheriff; nor to balk an evidence with a multitude of sudden insnaring interrogatories; nor maintains any correspondence with the knights of *Alsatia*, or ram-alley vouchers. He can prosecute a suit in equity, without seeking to create a *whirlpool*, where one order shall beget another, and the poor client be swung round (like a cat before execution) from decree to rehearsing, from report to exception, and *vice versa*, till his fortunes are shipwrecked, and himself drowned, for want of white and yellow earth to wade through on. He never studies delays to the ruin of a

family, for the lucre of ten groats; nor, by drilling quirks, spins out a suit more lasting than buff, depending a whole revolution of Saturn, and entailed on the third and fourth generation. He does not play the emperic with his client, and put him on the rack to make him bleed more freely, casting him into a swoon, with frights of a judgment, and then reviving him again with a cordial writ of error, or the dear elixir of an injunction, to keep the brangle alive as long as there are any vital spirits in the pouch. He can suffer his neighbours to live quiet about him, without perpetual alarms of actions and indictments, or conjuring up dormant titles to every commodious seat, and making land fall five years' purchase, merely for lying within ten miles of him.

He delights to be an arbitrator, not an incendiary, and has *beatus pacificus* oftener in his mouth than *currat lex*. He never wheedles any into endless suits for trifles, nor animates them to undo themselves and others for damage feasant, or insignificant trespasses *pedibus ambulando;* but (as *Telephus'* sword was the best cure for the wounds it made) advises people to compose their assaults and slanders over the same ale that begot them; nor does he, in weighter cases, extort unreasonable fees; for whatever the foulchapped rabble may suggest, a lawyer's profession is not mercenary; the money given him is only an honorary gratuity for his advice and trouble, or a grateful acknowledgment of our obligations for his well intended endeavours; and the old emblem of the brambles tearing off the sheep's fleece that ran to it for shelter in a storm, can have no reflection upon him, whose brain is as active, and his tongue as volatile, for a pennyless pauper, as when oiled with the *aurum potabile* of a dozen guineas.

In a word, whilst he lives, he is the delight of the court, the ornament of the bar, the glory of his profession, the patron of innocency, the upholder of right, the scourge of oppression, the terror of deceit, and the oracle of his country; and when death calls him to the bar of heaven, by a *habeas corpus cum causis*, he finds his judge his advocate, nonsuits the devil, obtains a liberate from all his infirmities, and continues still one of the long robe in glory.

REVIEW.

Reports of Cases argued and ruled at Nisi Prius, in the Courts of King's Bench and Common Pleas, from Easter Term, 33 George III, 1793, to Hilary Term, 39 George III, 1799. By *Isaac 'Espinasse*, of Gray's Inn, Esq. Barrister at Law.—A new edition, with Improvements. By *Thomas Day*, Counsellor at Law, vol. 1 and 2, 3 and 4, in 2 vols.—Hartford. Printed by Hudson and Goodwin. 1808.

WHATEVER is the comparative value of these Nisi Prius Reports in the courts of *Westminster Hall*, they have certainly been useful in this country, which is proved by the explanations they afford of the practice on innumerable points, which frequently cannot be found in the solemn adjudications of the whole court. Disputes on practice, and on principles of evidence may be severely contested here, which, having been long settled, are allowed no more to be controverted in *Great Britain*. If such is the importance of these reports, their value is doubled by the labours of Mr. *Day*. In the hurry of jury trials, little opportunity is afforded to the counsellor for research among the authorities; and to the collected wisdom of hundreds of years, as displayed in the annals of the law, or explained by the treatises of grave and learned men, the reporter has less leisure to make references, when the usefulness of his volume depends so much upon its early publication. With all his diligence, Mr. *'Espinasse* has not usually referred to more than one book in the course of ten or a dozen pages; but the citations in Mr. *Day's* edition amount to many thousands, and he has more on a single page in some cases, than are to be found in the whole four volumes of the *English* reporter. We shall extract part of Mr. *Day's* advertisement, to show the public what were his objects in this work, and we assure them they are completely attained.

The improvements attempted in this edition, consist of *references*, *notes* and *corrections*. The references are to other reports of the same case; to other cases supporting or oppugning the same point;

to analogous cases; and to the opinions of eminent jurists. The notes are abstracts of analogous cases, and observations upon them. The corrections are limited to such errors in the text, as were evidently either clerical or typographical.

The notice taken of *American* cases, the editor trusts, will add something to the value of the work. In the states in which they were decided, they will, of course, be regarded as authorities. In the other states, their use to illustrate principles, and to guide in the application of them; to extend the range of juridical inquiry; to concentrate the wisdom of many, sanctioned by the test of experience; to guard against sudden impressions, and local prejudices; and, especially, to lead to a uniformity of decisions in different jurisdictions, which, though separate, are yet so connected, that uniformity is essential to reciprocity and justice, will be perceived, and acknowledged by every liberal lawyer.

Besides the references to *English* authorities on the same topics, or to analogous cases, the law books of our side of the water are found in the margin. This will open new sources of information to many of our bar, who, however conversant with the ancient and modern adjudications in *England*, are not unfrequently so ignorant of the decisions in any other state, than their own, as never to have heard the names of some of the reporters. Mr. *Day's* American authorities, though perhaps all of them do not deserve that name, are, 1 and 2 *Washington's* Reports, *Addison's* do. 1 *Hayward's* do. *Taylor's* do. 1, 2 and 3 *Cranch's* do. *Bay's* do. 1, 2, 3 and 4 *Dallas's* do. *Wallace's* do. 1, 2 and 3 *Caines's* New York Term Reports, 1 and 2 *Johnson's* Term Reports, 1 and 2 *Caines's* Cases. *Pennington's* Reports. 1 *Hening* and *Munford's* do. 1 *Peters'* Admiralty Decisions. *Kirby's* Reports. 1 and 2 *Root's* do. 1 *Day's* Cases. 1 and 2 Massachusetts Term Reports. *Caines's* Lex Merc. Am. *Chipman.* 2 *Swift's* System.

It is not to be expected, that the case, cited by a lawyer, will always have a favourable influence on the principle, he would support. In a note to *Arden* v. *Sharpe et al.* 2 *Esp.* 525, Mr. *Day* says, it is not necessary, " that the act" of one, " in order to to be binding upon the partnership, should be done with the

assent or knowledge of the others: Nor that it should be done on the partnership account. The act of one partner, in the usual course of business, in the name of the partnership, though on his *private account*, will bind the partnership." For this latter point we are referred *Drake & al.* v. *Elwyn & al.* 1 *Caines* 184. But the difficulty in that case was chiefly the proof of partnership. To the point, after that, whether the note, signed by the style of the firm was given on a partnership transaction, judge *Kent* says: "The intendment is, that it was on a partnership account, and that intendment ought to have been repelled by the defendants, if not founded in truth." This appears to us a little at variance with the principle it was cited to establish, which is, however, good law.

Another part of this same note is worth extracting, to show the strange custom of our sister state of *Connecticut*.

The principle, which makes the act of one partner, in the course of trade, the act of the partnership, does not apply to *deeds*. One partner cannot bind the partnership by deed, though executed in the partnership name. *Harrison* v. *Jackson, et al.* 7 *Term Rep.* 207. *Gerrard* v. *Basse, et al.* 1 *Dal.* 119. And, *a fortiori*, a covenant, or a promissory note, where such notes are specialties,* executed by one partner, in his *individual* name, though on the partnership account, will not be binding on the partnership. *Mead* v. *Tomlinson*, 1 *Day's Ca.* 148. *Ripley* v. *Kingsbury*, 1 *Day's Ca.* 150, note (*a.*) Neither can partners compel each other to *appear in suits*, nor *represent each other in courts of law. Per Chase, J. Hills, et al.* v. *Ross*, 3 *Dal.* 331.

* *In* Connecticut, *promissory notes are regarded as specialties.*

That lord *Kenyon's* opinion, in *Rex* v. *Eden*, 1 *Esp.* 98, was erroneous, is fully proved in Mr. *Day's* notes. The defendant was indicted for perjury, in his testimony on a former trial; and *Brett*, against whom a verdict was given, in consequence of *Eden's* testimony, being called as a witness for the prosecution, was objected to, as incompetent, unless he had paid the debt and costs in that action. His lordship admitted the force of the objection, and rejected the witness, because, "it appeared to him, that, in case the defendant was convicted on this pro-

secution, that *Brett* would be relieved in a court of equity against the judgment, the verdict having been obtained on the sole evidence of *Eden*. That therefore the conviction of *Eden*, being the means of relieving him from the judgment, was an interest which rendered him incompetent."

Part of another noté on this case we extract, as a specimen of the diligence of the *American* editor:

The person, in whose name an instrument has been *forged*, has been uniformly held to be an incompetent witness to prove the forgery; and this is considered by lord *Ellenborough*, [4 *East*, 582] as an anomaly in the law of evidence. "Upon what principle," he adds, "the anomalous case was so settled, I cannot pretend to say; but, having been so settled, it may be too much for judges sitting upon trials, to break in upon it. The anomaly can only be remedied now, by the legislature." Vide *Watts' case*, *Hardr.* 331. *S. C.* 3 *Salk.* 172. *Rex* v. *Russell*, *Leach's Cro. case*, 10. *Robert Rhodes' case*, *Leach's Cro. case*, 25, 26. *Rex* v. *Taylor*, *Leach's Cro. case*, 215. *Caffy's case*, 2 *East's P. C.* 995. *Rex* v. *Rhodes*, 2 *Stra.* 728. *Peake's Ev.* 168, 9. In *Connecticut*, this anomaly has been adopted from the *English* law. *State* v. *Bronson*, 1 *Root*, 307. *State* v. *Blodget*, 1 *Root*, 534. But not in *Pennsylvania*. *Respublica* v. *Keating*, 1 *Dal.* 110. *Pennsylvania* v. *Tarrel*, *Addis.* 246. *Respublica* v. *Rose*, 2 *Dal.* 239; nor in *Massachusetts*. *Commonwealth* v. *Hutchinson*, 1 *Mass.* Term. Rep. 7. Mr. *East*, in his *Treatise of the Pleas of the Crown*, *vol.* ii. *p.* 994. attempts to show, *that the distinction is not an arbitrary one*. His reasons in support of it are certainly plausible. One of them, Mr. *Evans*, in the appendix to his translation of *Pothier*, *p.* 316, says, he has heard assigned by a learned judge.

The cases, in which the action for money had and received will lie, and where not, are well marshalled by Mr. *Day* in a note to *Marriott* v. *Hampton*. 2. *Esp.* 548. An important note will be found on *Chaters* v. *Bell & al.* 4 *Esp.* 49.

The *American* authorities are usually cited after the *English* upon the same point; and we wish the editor had uniformly adhered to that rule. The names, that most frequently appear in the notes, are *Dallas*, *Caines*, *Johnson*, *Bay*, and *Cranch*. *Root's* Reports are perhaps quoted oftener, than their value

will justify. Our Massachusetts Reports occur but twice or three times. Mr. *Day's* Reports of Cases in Error, which the character of the editor must stamp with high value, are referred to with a parent's fondness; but we hope the gentleman will favour the public with another volume of them and will also continue the publication of these Reports at Nisi Prius on the same principles, which he has followed in the work before us. Such unusual diligence must be successful; and to every *American* lawyer, desirous of possessing the reports of *Espinasse*, we earnestly recommend this edition of Mr. *Day*.

The mechanical part of the book deserves praise: the paper is better than our *American* press often employs; the proof sheets have been revised with considerable care; so that the book is decently correct, more so than the *London* copy, which is certainly not to be said of one book in three from our printers; the binding is the best we have seen. The price, though the work is one of the few *American* editions worth much more than the *English*, is three dollars less than the copies imported. This may appear a proper place for censure on some of our *Philadelphia* and *New York* publishers, who charge enormous prices on their editions of *English* books. We may specify *Bosanquet* and *Puller's* Reports, as uncommonly dear, and of very villanous execution.*

[* The *Philadelphia* edition of *Robinson's Reports* deserves the severest censure on these accounts. I am inclined to believe that *Bos. & Pul.* except the title page, was printed in *Dublin*.]

THE

American Law Journal

AND

MISCELLANEOUS REPERTORY.

BY JOHN E. HALL, ESQ.

OF BALTIMORE.

VOL. II. APRIL, 1809. No. VI.

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1809.

TO READERS AND CORRESPONDENTS.

WE are preparing for the ensuing number of this Journal the following articles:

A comprehensive view of the proceedings in the case of Olmstead.

A review of the celebrated Napoleon code.

A translation of a chapter of Dr. Duck's treatise *De usu et authoritate juris civilis Romanorum, &c.* The part which we have selected contains an historical account of the rise and progress of the Civil Law in England.

Some important State Laws. In this department of the Journal, there has been an apparent neglect; but the Editor is not the first who has been deluded by the *word of promise*, which has been kept only *to the ear* or failed *in its promised largeness.*

To an honourable Judge in Carolina and another in Georgia we return our thanks for their communications, and the obliging manner in which they were transmitted.

We are also indebted to an anonymous correspondent in New-York for a pamphlet.

The interesting paper respecting the Connecticut Laws has been mislaid. May we hope that our *Harford* friend will pardon our inattention and transmit another copy.

In VOL. I. p. 213 a reference to a decision by CHIEF JUSTICE EYRE is erroneously inserted in the margin. It belongs to the text and should have been inserted after the 24th line.

We regret that we have not room in the present number for an article of literary intelligence.

Messrs. Farrand & Co. have put to press a new edition of *Bacon's* abridgment, with all the subsequent decisions in Great Britain and this country. They are preparing *Comyns* for publication in the same manner. They are also making arrangements for reprinting the *whole*, we believe, of Lord Coke's legal writings. The merit of *Chitty* is attested by a second, and much enlarged edition, from the same press, of his valuable treatise on Bills of Exchange.

THE

AMERICAN

Law Journal and Miscellany.

No. VI.

Baltimore County.

MARCH TERM, 1809.

Govert Haskins, et. al. *v.* John Latour.
Replevin. Plea, property.

NICHOLSON, CH. J.* IT is certainly a general and well established principle that fraud vitiates all contracts. In order, however, to a due application of this principle, it is necessary that the technical sense of the term, *fraud*, should be well understood. There are many transactions, which, in common language, would be called fraudulent, that are not so in a legal point of view. Thus if a man says he has been offered a large sum of money for a piece of property, and thereby induces another to give an extravagant price for it, whenin fact no such offer had ever been made, this certainly would be fraudulent as far as a scandalous perversion of truth could make it so; but no question is better settled than that this is no fraud in a legal view. Or if a person should induce another to

* Absentibus Hollingsworth and Jones.

believe at this time that the decrees of France affecting our commercial interests were repealed, in order to enable him to effect an advantageous sale of tobacco, or coffee, none of us would hesitate to call it a fraud in common conversation, and yet we should hardly be asked to consider it so here for the purpose of annulling the contract which had been made under it, and carried into complete and entire execution.

I take the true rule to be this, as far as a rule can be laid down on a subject so minute in its character, and so various in the numberless shapes it assumes; where property is obtained by artful devices and contrivances, which a man of ordinary capacity, acting with ordinary prudence cannot guard against, the law will consider it fraudulent, and will interfere to relieve the party who has been imposed on.

Let this rule be applied to the present case. Latour in the ordinary course of business, as far as appears in evidence, purchased a quantity of claret from the plaintiffs on a credit of three and four months. The claret was delivered, and the notes executed and delivered. There was no device or contrivance of any kind to deceive the plaintiffs, no artifice used to induce them to sell. They relied on the credit of Latour, such as it was, and if they were not satisfied as to his ability to pay, they might have made enquiries or have asked him for security—if they did make inquiries we presume they were satisfactorily answered. A few days afterwards, however, Latour stopped payment, and the plaintiffs being alarmed, sued out a replevin to regain possession of the claret. Latour then supposing that other creditors might pursue the same course, made a deed of his whole property for the benefit of a few of his creditors, and shortly after published a notice of his intention to apply for the benefit of the In-

solvent Laws. Upon an investigation of his affairs it is now found that when he made the purchase, he was about 79,000 dollars in debt, and that his own property, credits, &c. amounted only to 50,000 dollars—In other words, that he was 29,000 dollars worse than nothing. From this it is argued that at the time of the purchase, he must have known his own inability to pay, that he never did intend to pay, and that therefore the purchase was a fraud upon the plaintiffs: that being a fraud the delivery of the claret did not transfer the property, but that it still remained in the plaintiffs and that they of course may recover in this action.

I cannot assent to this doctrine, though it certainly appears to be supported by the decision of my late predecessors in office for whose opinions and legal acquirements I entertain a very high respect, but to whom I cannot surrender my own judgement. When one man sells property to another in the common course of business on a credit, and delivers that property, the contract is executed; and the delivery transfers the property from the vendor to the vendee. The vendor relies on the responsibility of the vendee. It his duty to make himself acquainted with the vendee's character and circumstances: and if he neglects to do so, he must abide the consequences. He is bound to know the remedy given him by the laws of the country on a failure of payment, and if he has mistaken the character of the vendee, he must resort to his remedy.

Let the intentions of the vendee have been ever so bad, the vendor knew that he could compel payment if the vendee had sufficient property. To this he trusted. He cannot set up any pretext that the intentions of the vendee were to deceive when no deceitful artifices were used. He has, in fact, deceived himself by trusting an insolvent man, and shall not be allow-

ed to set that up as a fraud which is imputable only to his own negligence and folly. These principles are fully supported by the case cited by Mr. Justice Buller in 5. T. Reports 231. And no distinction can be drawn between that case and the one at bar, from the circumstances of that being a suit against the assignees of a bankrupt. The assignees of a bankrupt stand in the shoes of the bankrupt himself. They come in as of his estate, and not as purchasers for a valuable consideration. If Latour had committed an act of bankruptcy the day after the purchase and commission of bankruptcy had been awarded against him, there can be no doubt but that the property in the claret would have vested in his assignees. Not because the assignees would have been purchasers for a valuable consideration, for the act of bankruptcy, which might have been a second fraud, could not have legalized the first, but, because the property by the complete and entire execution of the contract had been previously vested in Latour.

In the matter of D. C. Stewart, *et. al.* Petitioners for the benefit of the Insolvent Laws of Maryland.

NICHOLSON, CH. J.* IN the Spring of the year 1806, Messrs. David C. Stewart and Company, being largely indebted to a number of persons, and finding themselves in insolvent circumstances, executed, on the 18th April 1806 a deed of all their property, rights and credits to James Purviance in trust, that he should pay and indemnify the Messrs. Hazlehursts for certain en-

* Abs. Jones J.

gagements, which, in the course of trade they had entered into for David C. Stewart and Co. and further to repay any balance which might afterwards remain to David C. Stewart and Co. These engagements were indorsements of certain promissory notes to the amount of between 19 and 20,000 dollars, which, I presume, are admitted to have been since paid by the Hazlehursts. It is alleged in justification of this deed, that it was made in pursuance of a verbal agreement long before entered into between David C. Stewart and Co. and the Hazlehursts, that each, when occasion required, should become indorsers for the other, and that in the event of a failure of either, the other should be secured in preference to all other creditors.

The question for the decision of the Court is, whether this is "an undue and improper preference of one creditor or security" in contemplation of the act of 1805, to deprive the parties of the benefit of that act.

In the construction of a Statute, there are certain leading, governing rules which ought never to be lost sight of:

1. What the Law was before the Statute?
2. The mischief intended to be remedied, and
3. The remedy which the Statute provides for the mischief.

At Common Law and independent of the several acts for the relief of insolvent debtors, a creditor had almost an unlimited power over his debtor. Not only the debtor's effects in possession, but the future earnings of an industrious life, were subject to the claims of his creditors, and if these were not sufficient to satisfy their demands, the person of the debtor might be immured in jail as long as he lived. If he had made a fair and honest surrender of *all* his property for the benefit of *all* his creditors, and had thus exhausted

his means of payment by discharging all his debts as equally and as fully as he could, the same power of an obdurate creditor still continued, and one who had received his equal benefit of his debtor's property, might still make requisitions on his person and his future acquirements; thereby cramping the industry of the debtor and repressing that spirit of enterprize which a wise and enlightened policy, will always rather promote than discourage.

Such was the *law*, and such the *mischief* intended to be *remedied*. But the legislature, in providing for the release of the debtor, took care, at the same time, to protect, as far as they could, the interest of the creditors.

Upon looking into the act, it will at once be seen, that the great principle upon which it is founded, is, that the debtor shall surrender *all* his property for the common benefit of *all* his creditors. He can only obtain his discharge on complying with this requisite, and some others of an inferior nature. When he *has* complied, then he is entitled to his discharge.

But the 9th section, provides, that if it shall appear at the time of the debtor's application to the Court, or within two years thereafter that the debtor, prior to his application, had assigned or conveyed any of his property with intent to give an undue and improper preference to any creditor or creditors, or security, that then the debtor shall be forever precluded from any benefit of the act.

It is contended that a debtor's assigning away his whole property for the benefit of particular favoured creditors is a *mere* preference and not an *undue* and *improper* preference. It is not an easy matter to determine what is an *undue* and *improper* preference, as contra-distinguished from a mere preference; but a

case may be supposed where the distinction exists.—A debtor may have one third of his effects in money and the other two thirds in notes payable at a distant day; if he pay his money to one or two particular creditors and surrender his notes for the benefit of the others, there is a preference in point of time and certainty which, perhaps, might not be called undue and improper: or if a debtor has notes payable in a short time, which he transfers to favoured creditors, or gives them merchandize which will readily bring money, and surrenders to other creditors real estate that will pay them only if sold on a credit; this possibly might not be deemed an undue and improper preference, although it is certainly a preference in some degree; but if a debtor gives to one creditor *every thing* he has, leaving all the others without the most remote possibility of ever getting a dollar, how can it be said that this is not an undue and improper preference? If the Legislature did not mean to provide against a case of this kind, those expressions in the act are nugatory, for there can be no instance of undue and improper preference if this is not one.

The Legislature made an innovation on the Common Law by depriving creditors of their Common Law remedy, and by holding out great advantages to the debtor if he would make a fair and honest surrender of all his property for the equal benefit of all his creditors. But they certainly intended to place all creditors on an equal footing by providing for an equal distribution of the debtors effects in proportion to his debts. It could not be their intention to allow him to give a *preference* to *one*, and to *destroy*, at the same time, his *liability* over to the *others*. Such a provision would be iniquitous in the extreme.

The act is intended to confer a benefit on the debtor, and the ground-work of that benefit is a surrender

of *all* his property for the benefit of *all* his creditors. But how is the spirit of the act complied with, when a man assigns the *whole* of his property *to day* to one creditor, and comes in to-morrow offering to surrender that which he has before disposed of and which he *has not*, for the benefit of the others?

It is argued that at Common Law, a man may pay all his property to one creditor, in discharge of a *bona fide* debt, to the exclusion of all the others, and that this act of 1805 does not take away his right of giving a preference. Of this there can be no doubt. It is a right with which the act does not interfere. It only declares, in substance, that if a debtor does insist on and exercise his Common Law right of preferring one creditor to the exclusion of all the rest, *he must take the Common Law consequences.* His person and his subsequently acquired property must remain liable to the claims of his excluded creditors. But if he comes in and asks for a benefit under this act, if he asks that his person and his subsequently acquired property shall be discharged from antecedent debts, he can only get them discharged by showing that he has complied with all the terms prescribed by the act. One of these, and a principal one is that he shall surrender all his effects in possession, reversion or remainder, and another that he shall not have assigned any part of them away either for his own benefit, or with intent to give an undue and improper preference to one or more creditors or securities. This *intent* in the present case is manifested clearly by the assignment being made at a time, when the parties knew, as their letter shows, that none of their creditors except the Hazlehursts, had the most remote chance of ever being paid any thing.

This assignment has been attempted to be supported, by a reference to English authorities under the bankrupt system, where an assignment of *a part* of the bankrupt's effects in discharge of a *bona fide* debt has been sustained; but I think the most laborious research may be defied to produce a single instance, in which the assignment by the debtor of his whole effects, to one or more creditors in exclusion of all the rest, has been sustained, when the assignment was made at a time that the debtor knew of his own insolvency and with no other intent than to give a preference.

The agreement that is said to have existed between David C. Stewart and Co. and the Hazlehursts can have no influence in this case. It is a sufficient answer to it, to say that it was *secret*, and that there is no Court of Equity that would enforce it. If it was not binding on the *parties*, it can hardly be insisted on to the injury of *third persons* who gave a credit without knowing that there was such an agreement. I think I may add, that if such an agreement was known to exist between any two houses in Baltimore, and it was known to be binding, the credits of those houses would sink instantaneously.

This subject has been considered above without any reference to the act of 1807, which is a supplement to the Insolvent Law, and declares that any deed, conveyance, transfer, &c. of any property, debts, rights, or claims to any creditor, security, &c. by any person with a view or expectation of becoming an insolvent debtor, shall be, and the same is declared to be, an *undue* and *improper* preference, within the intent and meaning of the 9th section of the original act.

It is said that this supplement cannot have an effect on the deed of David C. Stewart and Co. to Purvi-

ance, because the Law did not pass until after the deed was made; and therefore it is as to this deed an *ex post facto* Law. Without adverting to what I consider the correct application of that clause in the Constitution, (which declares no *ex post facto* Law shall pass,) to *criminal* Laws exclusively, I think I may be permitted to say, that if the Supplement of 1807 be an *ex post facto* Law, so is every Insolvent Law that has passed in the State of Maryland for many years. Every one of these Laws declares that if the debtor has done certain things *before* the passage of the Law, then he shall derive no benefit under it, clearly imposing a disability on account of something antecedently done. Thus if one of the persons named in the act of 1804, had, before the passage of the act, made a fraudulent conveyance with a view to benefit himself, or if he had lost 100 dollars by gaming, &c. he could derive no benefit under that act, and no one ever thought it to be an *ex post facto* Law on account of that provision. Or, if the act of 1805, had not been continued for five years, and an act had passed in 1807 in the usual way for the relief of persons whose names were recited in it, (David C. Stewart and Co. among others) containing the very words of the Supplement, instead of those in the 9th section of the original act, David C. Stewart and Co. would hardly have said that it was an *ex post facto* Law, or that when they asked a favour of the Legislature, the Legislature should not be permitted to grant it on such terms as they might think proper to prescribe. If such a provision might with propriety have been inserted in the original act, or if it might have been inserted in an act of a general nature passed in 1807, why could not the Legislature in 1807, prescribe the terms upon which future applicants for the benefit of the Insolvent Laws

should be discharged? All the Insolvent Laws have been for the benefit of persons who should afterwards apply to the Chancellor or to the County Courts, but they are expressly prohibited from deriving any benefit, if they have been antecedently guilty of certain acts of misconduct. The Supplement of 1807, as it relates to all cases similar to this, does nothing more than prescribe the terms upon which future applicants shall be released from the payment of their debts, and the Legislature were as competent to do this as to do any thing else. Before the Supplement of 1807 David C. Stewart & Co. had acquired no rights under the act of 1805, and the Legislature might have repealed it without an injury to them; if they were competent to repeal, they were surely competent to amend, and the supplement of 1807, must be construed as an amendment to affect all subsequent applications of insolvent debtors. The application of David C. Stewart and Co. for the benefit of the act 1805 and its Supplements, was not made till July 1808 and their rights, if indeed they have yet acquired any, could not have commenced before that period. They certainly did not commence with their misfortunes, or every man whose circumstances are now sinking may urge that he too has rights with which the Legislature must not interfere, and that therefore, the act of 1805 cannot be repealed before its limited existence of five years expires; nor indeed, that it cannot be changed or altered. If this claim on the part of the debtors is well founded, may not the creditors put in their claims too? May they not insist (as their debts were in existence before the several Supplements that have since passed giving to debtors a much greater facility in procuring discharges, than they at first had) that the Legislature had no right to interfere, and may they not

by urging their claim a little further, lay an axe to the root of the original act itself? In fact, a solemn argument has been made on the part of creditors, before the Court of Appeals on the Eastern Shore against the constitutionality of the insolvent laws, but without effect.

The only *plausible* objection that can be urged against the Supplement of 1807 is, that inasmuch as it declares the meaning of a provision in the act of 1805, it may be used to defeat rights antecedently acquired under it; and that persons who had before been discharged notwithstanding their having assigned their property to preferred creditors, might be afterwards held liable. But this objection need not to be examined here, as it does not apply to the case before us.

I have always thought that an assignment of property to one or more creditors to the conclusion of others, in contemplation of insolvency, was an undue and improper preference within the meaning of the act of 1805 and have heretofore, in the case of *Hawkins* and *Claggett*, given an opinion to this effect. But the Supplement of 1807 puts the question to sleep, as to all applications for the benefit of the Insolvent Laws made subsequent to its passage.

Hollingsworth J. concurred with the chief Justice as to the effect of the Supplement of 1807, and therefore deemed it unnecessary to make any further observations.

Habeas Corpus in case of Emanuel Roberts.

NICHOLSON, CH. J.* THE petition upon which the Habeas Corpus is sued in this case, contained a state-

* Absentibus Hollingsworth and Jones.

ment of facts verified upon oath, extremely different from those which have appeared in evidence. The petition stated that Emanuel Roberts the son of the petitioner had been seized, and forcibly carried on board the brig Syren, commanded by captain Gordon, and lying in the Basin of Baltimore, where he had been detained since the 10th of April. The statement detailed so gross a violation of Law, and intimated to the court something so extremely like impressment, that no hesitation was felt in granting a writ which every citizen illegally held in custody has a right to demand—If the facts as stated in the petition had been supported by evidence, the party detained must have been discharged, whether the detention had been by officers of the United States or others, and I would most certainly have held them to bail, to answer upon a criminal prosecution. But it appears as well by the return of the *habeas corpus*, as by the testimony adduced, that Emanuel Roberts had voluntarily enlisted in the service of the United States, and had received from the recruiting officers three months pay in advance: the question therefore necessarily arises how far this Court can take cognizance of the case. No man is more anxious to preserve, nor will more steadily persevere in the support of the State authorities, than myself.—I consider the well adjusted balance between the general and State governments to be essential to the preservation of the blessings of each, and as in the exercise of my public functions, I will never suffer the general government or its officers to infringe such of the State rights as are trusted to me, so I hold it to be my duty not to interfere with the rights of the general government.

The constitution gives to the United States the power of raising and maintaining a navy: Congress have

by Law directed the President to enlist for the service of the navy, a certain number of men, and the brig Syren has been sent to Baltimore for the purpose of completing her crew. The whole of the evidence shows, nor indeed is the fact now pretended to be denied, that the party whose release is applied for, had enlisted in the service of the United States. It is therefore a proceeding under the authority of the United States. This court, however, is called upon to go further, and to enquire into the regularity of the enlistment, it being alledged that the party is only sixteen years of age, and was drunk when enlisted.

The power of the Court to examine into the regularity of the proceeding, is only contended for on the ground that the citizens of the State are entitled to its protection: that the writ of *habeas corpus* is all important to secure the liberty of the citizen, and that every man may claim relief under it. These positions cannot be denied, and might apply very forcibly to the case under consideration if there was no contract or agreement to service in question. To this contract the United States is one party, and an individual the other. Emanuel Roberts by an agreement in writing, signed by himself, has contracted to serve the United States for two years at a stipulated price, and has received a part of his wages. I know of no Law by which the United States can be made a party in a State Court, except only where special acts of Congress have given the State Courts jurisdiction, and if the United States cannot appear in a State Court to prosecute a suit in their own behalf, unless in cases specially provided for, how can we call them before us to enquire into the nature of their contracts with individuals, if in our judgement they shall appear to have

been irregularly made, or to be oppressive to either party?

An extreme case has been supposed, in which I acknowledge that I would interfere without hesitation. It is asked if a child of eight or ten years of age had been enlisted, would the Court refuse to discharge him? I answer no—I would discharge him because of his incapacity to make a contract, not an incapacity arising from the general principle that he who has not attained the age of twenty-one years, is incapable of binding himself, but from an actual imbecility of mind owing to his tender years. If in such a case I should exceed the technical limits of my authority, I should have the approbation of all good men for resisting oppression under the colour of Law—Emanuel Roberts is not of this description, and if he be only 16 years of age, he is remarkably well grown—Although it is a general rule that a person under twenty-one years of age, cannot bind himself by contract, yet I am far from saying that this rule will apply in its unlimited extent, to prevent young men from enlisting in the service of their country, or to authorize their discharge upon an application to the Courts of the United States. The history of our own times has taught us that young men under twenty-one years of age, if not the best, are certainly not inferior to any other soldiers in the world.

This case differs very widely from that of *Adair* and *Ogden* in which I did interfere and discharged the parties. They stated, in their petition, that they were confined in Fort M'Henry without the authority of Law, and prayed for a *habeas corpus*, which was granted them. It appeared on the return of the writ, that they had been arrested by general Wilkinson at New-Orleans on a suspicion of their being connected with

Burr in certain treasonable practices, and had been transported by sea to this place to wait the order of the Secretary at war. They were private citizens, not subject to military authority, and as there was not a shadow of proof against them, I was bound to discharge them from arrest. Whatever might have been my private opinion of their guilt, I was not at liberty to remand them into custody without some evidence furnishing a probable cause of suspicion against them. Presuming that some such testimony might possibly be in possession of the President, I wrote immediately to him, informing him what had taken place, and requesting him to send on any proof that he might have, upon the receipt of which I would issue a warrant and have them arrested. But I believe he had none. As general Wilkinson had no right to arrest them, his inferior officers of course could have none to detain them, and as there was no proof of their guilt before me, I had no power to commit them. The officers there acted without even the colour of authority; but here the whole proceeding is under the Constitution and Laws of the United States. I am therefore decidedly of opinion, that this Court has no right to interfere in the present case; and if it had, I am not very certain that I should discharge the party with a knowledge of the facts that have been proved.

John Carrere against the Union Insurance Company of Maryland.

[The desire which we feel to rescue from suspicion the name and character of a worthy man, and valued friend who has fallen a victim to his own good nature and the ignorance or corruption of a faithless translator, induces us to report the following case in a much more ample manner than is necessary for the illustration of its legal principle. To our readers this is the only apology which we make for the introduction of matter, which is certainly irrelevant to a mere report.]

THIS was an action on a policy of Ensurance, upon the cargo of the schooner Venus, in a voyage from Baltimore to Bourdeaux in France. The policy bears date on the fifth day of June, 1806, and contains a clause warranting the goods to be American property, with the usual stipulation confining the proof of neutrality to the United States.

The facts, as they appeared in evidence at the trial, and in the bill of exceptions taken in the case, are as follows: -

On the fifth of June 1806, the date of the policy, Mr. Carrere had projected the voyage, and had provided the greater part of the cargo consisting of sugar and cotton. A parcel of this sugar, twenty-three barrels, had been purchased by him from James Chaytor, a native citizen of the United States, who had formerly sailed in his employment.

On the seventh of June 1806, Messrs. Caze and Richaud, merchants of New-York, and naturalized citizens of the United States, wrote to Mr. Carrere, directing him to sell for the best price that could be

obtained, one hundred and one bags of Carraccas cocoa, which had been consigned to him for their account. Having attempted in vain to sell it, at such a price as he thought proper to accept, he resolved to take it on his own account, at twenty-seven cents per pound short price, and to ship it in the Venus, as part of the cargo to be covered by the policy.

Pursuant to this determination he put this cocoa on board, with the rest of the cargo, on the 28th of June 1806. The cargo consisted of this cocoa, of the twenty-three barrels of sugar purchased from Chaytor, of forty-one hogsheads of brown sugar, forty-four hogsheads of clayed sugar, and two hundred and seventy bales of cotton. Regular bills of lading for the whole cargo, stating it to be the property of Mr. Carrere, were signed by the captain, and to one of them was annexed an affidavit, made before S. Sterrett on the 28th of June, by Mr. Carrere, declaring the whole cargo to belong to him. The bill of lading with this affidavit annexed to it, was put on board as one of the documents of the cargo.

This affidavit was strictly true at the time of making it; for having authority from Caze and Richaud to sell the cocoa, he had a right to become the purchaser himself, and his sale of it to himself, vested the property in him.

On the next day after shipping the cargo, and making the affidavit, June 29th 1806, he informed Messrs. Caze and Richaud, by letter of that date, that he had taken the cocoa on his own account, and shipped it part of the cargo of the Venus.

On the second of July the manifest of the cargo was signed and sworn to by the captain, and the vessel cleared out for her intended voyage.

On the same day Messrs. Caze and Richaud, having received Mr. Carrere's letter of June 29th, relative to the cocoa, wrote him an answer disapproving of the purchase which he had made of the cocoa, on account of the lowness of the price, and requesting that the shipment of it might be considered as on their account. This letter Mr. Carrere received on the 4th of July, before the schooner Venus had sailed.

About the same time, the 2nd or 3rd of July, James Chaytor called on him, and represented that the twenty-three barrels of sugar had been purchased at too low a price; for which reason he requested, as a favour, that Mr. Carrere would consent to recind the sale, and to let this shipment be considered as on his, Chaytor's, account. To this proposition Mr. Carrere assented, as well as to that made by Messrs. Caze and Richaud in their letter of July 2nd.

All these facts were proved by the original letters produced in Court, by the testimony of Mr. Richaud, and by the deposition of James Chaytor. These letters are subjoined to this report.

Mr. Carrere having consented to rescind these two sales, and to consider the cocoa and the twenty-three barrels of sugar as shipped for the account of Messrs. Caze and Richaud, and of captain Chaytor, omitted the regular steps which this change of property required. The papers and documents were then all made out, and on board. The vessel had cleared, and was on the point of sailing. It was the 4th of July a day of bustle, rejoicing and military parade, when it is extremely difficult to get any business done. He therefore, in the hurry of the moment, resolved to let all the papers remain as they were, and merely to mention in a letter to his correspondent in Bourdeaux, that the cocoa was the property of Caze and Richaud,

to be accounted for with them, and that the twenty-three barrels of sugar belonged to Chaytor, on whose account the sales were to be made, and the returns transmitted. This he accordingly did.

But in this letter which was written and dated on the 4th of July, he designated Caze and Richaud by the letter R, merely; and he omitted to state the manner in which the property had been transferred back to them and Chaytor, after the papers were signed and put on board—neither did he state that Caze and Richaud and Chaytor were citizens of the United States.

These facts and explanations certainly were not necessary to his correspondent, for which reason probably they were omitted; but he forgot that the vessel might be taken, and the letter read; in which case there would appear a contradiction between his letter and his affidavit. Being conscious of the truth of the the fact, he did not advert to the propriety and importance of placing it in such a situation, that it might always appear on an inspection and comparison of the papers.

An accidental circumstance led him into another errour. Sometime before that period a shipment of goods had been made by his correspondent, from Bourdeaux to the Isle of France. Bonds had been given in Bourdeaux, according to the laws of France, for the landing of the goods in the Isle of France, or some other French port. These bonds could not be taken up, without a certificate of the landing from the proper officers in the French port of destination.

Such a certificate had been obtained and sent to Mr. Carrere, who wished to transmit it by this vessel to his correspondent at Bourdeaux. But knowing that such a paper, found on board an American vessel, had

been made by the British a pretext for capture, and even for condemnation, he resolved to conceal it on board, in order to avoid this danger.

If he should trust it with the captain, and the vessel should be taken, the captain in his examination would be compelled to disclose it. If he hid it on board, and explained the manner of hiding it, in any letter on board that could be read, it would be the same thing as not concealing it. He therefore resolved that his letter of July 4th, in which directions were given for finding this paper, should be written in sympathetick ink. This was accordingly done. He first wrote the letter in common ink, and then caused it to be copied by his clerk in sympathetick ink, at the bottom of a short letter of no apparent importance, written in a feigned name, in common ink, and addressed to his correspondent in Bourdeaux by a feigned name.

This letter was then put on board of the schooner, and she sailed for Bourdeaux on the 4th or 5th of July 1806.

By this inadvertency on one subject, and over caution on another, Mr. Carrere suffered his vessel to go to sea with a concealed letter on board, containing the statement of a fact relative to the ownership of the cargo, which apparently contradicted his own affidavit.

It is evident that there was no motive, and could have been no design, to practice any concealment, much less any deception, as to the ownership of the cargo. Messrs. Caze and Richaud and captain Chaytor were citizens of the United States, as well as Mr. Carrere. Their property was as safe on the ocean as his; and ensurance on it could have been obtained on as easy terms. The plan of concealment therefore was manifestly contrived, to prevent the discovery

under such suspicious circumstances, a letter containing a statement respecting the ownership of a part of the cargo, apparently in contradiction his affidavit, had furnished justifiable ground of capture and detention, if not of condemnation, and had thereby violated his warranty of American property.

To this it was answered, on the part of the plaintiff, that the letter in sympathetick ink merely stated a part of the cargo to belong to other persons than the plaintiff, who for aught that appeared in the letter might be, and in fact were American citizens, as well as the plaintiff. That this letter, therefore, did not contain even *primâ facie* evidence, that the part of the cargo to which it related was not neutral but belligerent property, which is the meaning, intent and effect of the warranty. That, consequently, the letter did not furnish probable cause or justifiable ground for the condemnation, nor for the detention, of even that part of the cargo to which it related; and afforded no ground whatever for detaining the rest of the cargo, for which alone the action was brought, and which appeared by the letter itself, as well as by every document and paper on board, and by the whole evidence in the cause, to be the property of the plaintiff, an American citizen.

But the Court decided that the plaintiff, by putting this letter on board, had violated his warranty of neutrality, and therefore could not recover on the policy. The reasons for this decision were very ably detailed by the learned Judge himself, in the following opinion.

*Nicholson ch. J.** The facts in this case certainly do not come up to those existing in the cass of *Allibone* vs. *the Maryland Ensurance Company*, nor to those of

* Abs. Hollingsworth and Jones.

the case reported in New-York T. R. 549, in both of which the papers found on board the vessels, contained a direct assertion that the property belonged to belligerents. It is not so here: but although the facts are different, I cannot perceive how the difference can take this case out of the principles upon which those decisions were made.

The first principle laid down in *Allibone* vs. *the Maryland Insurance Company*, and which is the same as that contained in the New-York T. R. 564, is "that the property shall not only be accompanied with all the necessary papers to show its neutrality, but also that it shall be unaccompanied with any which may give it a colouring of a contrary character." It is now contended that these papers which give it a colouring of a contrary character must be, as in the other two cases, papers showing or stating it to be the property of belligerents. This, no doubt, would be correct, if the decisions of courts of justice rested, not on principles but on the mere circumstance of a subsequent case measuring in all its parts precisely with an antecedent one. It is needless to state that this rule does not and cannot govern. Two cases, each complex in its nature, are seldom found to agree in all their facts, and yet thousands are decided upon one and the same principle. It is the duty of the tribunal which is to decide, to bring every case on which it is to pronounce sentence, within some established principle of Law, and if it does not, the judgment will be erroneous.

What proof was there in this case accompanying the property to show that it was neutral? The invoice, the bill of lading and the oath of the party stating the whole to be his property, and stating also that he was a citizen of the United States. The manifest does not state to whom the property belonged. These were

all the acts of *Carrere* himself; for although the bill of lading was signed by the captain, yet it was at the instance and with the procurement and knowledge of *Carrere*, and must be taken to be his act.

If these papers had been the only evidence offered at the trial, before the Vice Admiralty Court of Halifax there can be no question, I think, but that the cargo would have been restored with the vessel. There was, however, found on board, a letter written by *Carrere* with sympathetick ink, stating about one fifth of the cargo not to belong to himself, as he had declared on oath, and as his other papers purported, but to belong to two other persons, one named *Chaytor* and the other designated by the letter *R.* neither of whom are declared to be American citizens. The circumstance of the letter being written with sympathetick ink, was, in itself, of a very suspicious nature. So far as it related to the cargo of the Venus, it had the appearance of containing something which the writer was unwilling should be communicated to any one but his correspondent, and more especially to those who, in all probability, would search for evidence to justify a capture and condemnation. It falsified also, in some parts at least, those documents which usually accompany the cargo to show its neutrality, by proving that although *Carrere* had sworn the whole to be his own, and that he himself was an American citizen, yet that one fifth at least belonged to others, of whose neutrality there was no proof, and whose names, for some purpose or other not known to us or to the Court of Prize were intended to be kept out of view. As to this one fifth, therefore, it may be fairly said that there was no document to show its neutrality, because there was a paper on board written by *Carrere* declaring it to belong to *Chaytor* and others, and they were not even

stated to be American citizens or neutrals of any other country. How does the case then stand as to the remaining four fifths? *Carrere* himself stood before the Court of Vice Admiralty as the only witness to prove the property to be his, or to prove that he was a neutral. He himself had falsified his own testimony in part, and it is a well established rule that if a witness is found to swear falsely in part, the whole of his testimony shall be rejected, unless supported by others, or by strong corroborating circumstances. It is true that he did not swear falsely as the case now turns out, but it appeared to the Court of Vice Admiralty that he had done so: the captain could give no explanation, there were no corroborating circumstances to support that part of the letter which related to the four fifths of the cargo, and in my judgement the Court were justified in rejecting the whole of his testimony. A tribunal less intent on plunder would, perhaps, have given further time to produce proof of the neutrality of the cargo, and would have restored it, if it had been eventually shown to be American property; but I think they would have been as much justified in detaining it, as if the vessel had been found at sea without any document to show the property she carried to be neutral. In fact she had no such documents, because those which were relied on were falsified *in part*, and therefore, not incorrectly rejected *in toto*. If it is necessary that the cargo warranted to be neutral, should be accompanied with documents to show its neutral character, which is not questioned, this cargo was certainly not within the legal import of the warranty.

The second principle contained in the opinion which I gave in the case of *Allibone* vs. *the Maryland Insurance Company* is probably embraced in the above

reasoning; but as the language of that opinion was said, in argument, to be too indefinite, and as its correctness was questioned even in its more restricted sense, I shall re-examine it here, because I consider it as bearing very strongly on this case.

I stated there "that whatever furnished a pretext for capture and detention would discharge the underwriters, unless that which is the pretext can be brought within the terms of the policy"; or, in other words, unless that which is pretended to be the true cause of capture and detention, is one of the risques insured against. *Mr. Harper*, in his argument supposed that the word *pretext* meant *probable cause of suspicion*, and the definition may be taken here as correct. But he thought the position untenable with this explanation, and urged, as I understood him, that "nothing would release the underwriters or falsify the warranty of neutrality unless it was an act which furnished justifiable cause of condemnation." This, certainly, cannot be well founded. A vessel and cargo are warranted to be neutral, by which warranty the assured contracts that they shall, on the voyage, be accompanied with documents to show their neutral character. These documents, however, are omitted, and the vessel is found at sea, by one of the belligerents, carrying a cargo evidently the produce of another opposing belligerent, and without any evidence whatever to show that although once a belligerent, it is now, *bona fide*, neutral. Here is probable cause of suspicion, and pretext for capture and detention, and it is furnished by the omission of the assured to send his documents with the vessel. As he had contracted to do this, his policy is void, for not having done it, but there is *no justifiable cause of condemnation*, because *other* evidence may be produced in the Prize Court to

prove the neutral character. The case of *Rich* v. *Parker* 7. T. R. 705. is completely to this point, nor is that of *Fitzimmons* v. *the New-Port Insurance Company* in the Supreme Court of the United States,* at variance with it. The probable cause of suspicion must be of something, which, if true, would justify condemnation. If the suspicion is not authorised by some act of omission or commission of the party assured, or his agents, then there is no *probable cause* furnished by them; and this was the ground on which the Supreme Court decided. The condemnation took place because the vessel *persisted in an intention* to enter a blockaded port, and neither the treaty between the United States and Great Britain nor the Law of Nations authorize the condemnation of a vessel for a *bare intention* to enter. There must be an *attempt* to enter, and the Court, although they admitted, for particular reasons, the conclusiveness of the foreign sentence, as to what it professed to determine, yet they did look into the facts found by the special verdict, to see if the captain had, by any act of omission or commission furnished probable cause of suspicion that he had attempted to enter, after being warned away. The condemnation could only be justified by an *attempt* to enter: no such *attempt* was made: the captain had furnished no probable cause to suspect that an attempt had been made, and the underwriters were held answerable. Not so in this case. Here the condemnation was on the ground of the property being belligerent: this was a justifiable ground, and though it was in point of fact, not true, yet the assured by not accompanying the cargo with proper documents to show its neutrality, or by falsifying those which did accompany it, furnished the captors with probable cause of

* Vid. Law Journal No. 5, ante.

suspicion, that it was not, what it professed to be, the property of an American citizen and therefore neutral. This risque the underwriters never meant to ensure against; and although the letter in sympathetick ink was not found until after the vessel was carried into port, yet being on board, it encreased the risque, authorized the detention, though not the condemnation, falsifies the warranty of neutrality, and, of course, discharges the underwriters.

I am therefore of opinion that the plaintiff cannot recover.

Verdict for the Defendant and Appeal.

Documents proved in this Cause.

New York, 7th June, 1808.

Mr. John Carrere, Baltimore.

SIR,

WE have received your esteemed favour of the 2nd instant, which advises us of the arrival of our mutual friend Mr. Francis Sequin, we have also duly received the accounts you sent us of that unfortunate adventure; the result of which is truly distressing for us. We cannot conceive how the suspenders could be so much damaged: the fact is, they were in very good *order* when they were sent from here. You may put this affair in the number of the unlucky ones.

As relates to the 101 bags cocoa which are the nett proceeds of that adventure, we wish you to sell them to the best of our advantage, even at a long credit, so as to facilitate the sale.

We have debitted you of 160 dollars for the return of premium of 4 per cent since the schooner Nimrod has only been in one port.

We are sincerely,

Yours, &c.

(Signed) CAZE & RICHAUD.

Baltimore, 29th June, 1806.

[TRANSLATION.]

Messrs. Caze & Richaud, New York.

GENTLEMEN,

I had not the pleasure to address you for some days, and I thought that my deferring to do it would enable me to announce you that I had affected the sale of your cocoa, but its quality being not in so great demand as the Laguira's, and that kind of produce being not otherwise very saleable in this moment, I could not succeed to dispose of it, but as you have manifested a wish to sell it here rather than have it shipped for Leghorn, (which is, I think, the best place for the disposal of such a kind of produce), I then thought proper to have it shipped for my own account, on board of a schooner that I have chartered for Bordeaux, and which was in want of 100 bags of coffee or cocoa to fill her up, which has mostly decided my disposing of your cocoa in my favour, and I think since its quality is a very common one, you will be satisfied with the price of 27 cents short price, and in order to make this business more profitable to you, I shall not charge you of any commission whatever; not of the disbursements I have made at the exportation of your goods for Maracaybo, neither at the importation of said cocoa; you will only have to pay for the premium of the ensurance I have effected on your goods from hence to Maracaybo and back: I hope gentlemen that you will be satisfied with my offer, and I am so much convinced of it, that I have already settled my papers, and the schooner Venus on board of which the said cocoa is shipped, will sail in a very few days; on your answer in the affirmative, I will forward you the account of sale of your cocoa.

Be so kind, gentlemen, as to send by the first opportunities the enclosed letters for New-Providence and Bordeaux.

I remain

Your most ob'dt servant,

(Signed) JOHN CARRERE.

tant du fret de cet objét—Les 23 barls sucre appartienent á James Chaytor et le fret est de £ 13 17s. 10d. que vous lui porterés en compte & le reste des marchandises est à moi—vous me crediterai du net produit de ces 23 barils—vous verrai par le fret énorme que j'ai été obligé de payer pour la Venus, la difference entre New York & ici—R. m'a informé que le fret de chez vous à New York étoit seulement de 45 shellings sterling. Dieu veuille que mon Vigilant á qui on a parlé à moitié traversée après 12 jours de mer soit arrivé à bien & que sa cargaison ait passablement rencontré ; si la Venus rencontroit bien aussi vous aurés d'après mes calculs une forte somme à moi & mes derniers volontés sont que vous frettés la Venus, si au moins vous pouvéz ; obtenir ce petit batiment au cours du fret & que sans perte de temps vous le chargiés pour mon compte en bon vin nouveau en Bque. à 2 cercles dè fer, & seulement 8 à 20 Bques. de vin vieux supérieur 500 caisses vin rouge bien soutiré & bon & à ne pas revenir à plus de 12 à 13. 10—500 caisses vin blanc bien rafiné & bon & dans le même prix—100 tierçons vin blanc bien rafiné, 100 chandieres assorties en dimentions, 200 panniers d'huille de toute excellence, 200 caisses fruits au vinaigre, 100 panniers de fruits à l'eau de vie, des bouchons longs & superfins & non d'autres, quelques sacs de bouchons á damejeannes—50 pipes de bonne eau de vie, quelques malles de jolis souliers à femme il les faudroit un peu plus couverts & les bouts point pointus & en fin s'il reste des fonds envoyés moi des Bretagnes, larges & étroites superfines, du fil à Papillion le plus fin, du linon, enfin un assortment de marchandises de modes & du dernier gout propre à la consommation de ce pays & des colonies, car vendre ici est selon moi une bonne affaire and je vois que nos boutiquiérs sont obligés d'aller à New York, pour se procurer de pareilles marchandises dont Richaud à dû vous donner des notes exactes, s'il n'y à pas d'apparences de paix frettés un grand navire & forcès l'article vin, chaudierès enfin d'objéts propres au débouché des collonies si au contraire la paix est probable bornès vous à ne m'envoyer que de l'eau-de vie & remplissès les faux rangs avec du caissage je ne tir-

rai point sur vous & je vous sollicite de me reméttre par un ou plusieurs navires que vous fretterès, tous mes fonds mais au nom de Dieu ne perdés pas un instant, si la paix venoit à se faire on perdroit le capital sur le vin, au lieu que l'eau de vie augmenteroit. *Donnés moi des avis prompts & annoncés dans cet avis, le probable départ du navire, afin d'obtenir la prime d'assurance meilleur marché, à cause de la saison.* En frettant un navire envoyés moi par lui un cte. ou comptes de vente de marchandises, augmentés le prix de la vente afin que les remises que vous me fairés paraissent être les retours des marchandises que je vous ai consignées, car un navire fretté est plus sujet à être pris que les miens & la cour de Halifax est abominable; par exemple les marchandises qui viendront par le Vigilant paraitront les retours de sa cargaison d'allée & les marchandises du navire fretté paraitront la balance dú Vigilant, le produit dés marchandises du brig Hannah & là Venus, mais prennez garde de faire cadrer tous les papiers par le Vigilant avec ceux du navire fretté; car il seroit possible que ces deux navires fussent ammenés à Halifax & dans ce cas il faudrait que tout cadrât, écrivés à la Manicle n'exposés par des volumes de papiers dans des malles mettés y seulement l'acquit à caution & ne vous chargés par de lettres qu'il faille cacher.

Je vous envoie une lettre pour C. & O. Durand—Je desire apprendre que vous ayiès fini avec eux pour mon objet.

Le Robert n'est pas encore arrivé ici n'y le navire dans le quel le cher oncle est, aussitôt son arrivée R. mà promis de l'amméner ici, j'aurai bien du plaisir d'embrasser ces deux bons amis agissés avec beaucoup de caution pour la nature des retoúrs—informéz vous bien s'il n'y à pas de probabilit éde paix, car encore une fois il y auroit de quoi se ruiner avec du vin.—le frere du médecin Chatard vous demandera quelque argent pour payer des livres qu'il lui demande, payès ce compte, debittés m'en fournissés m'en la note & envoyés moi les livres.

Toute reflexions faîtes paix ou guerre, si les eau de vie sont à bas prix, enfin, tel qu'en calculant tous les frais, frêt and assurances, droits ici, on puisse se permettre (engagnant quel-

que chose) de donner de l'eau de vie 4me. preuve de 100 à 120 cents. Je crois que ce seroit la meilleure remise & je crois aussi que si vous pouviez fretter un grand navire pour se rendre á La Rochelle & y prendre de 300 à 500 pipes d'eau de vie, cependant cette quantité arrivant dans deux navires différents rependroit mieux, les eaux de vie pourroit être achettées à l'avance par la maison Garéché de La Rochelle & le navire envoyé pour les prendre. Je pense toujours aux eaux de vie, parceque dans la situation où est l'Europe la guerre dans mon opinion ne peut pas durer. Je ne vous parle pas de mes affaires de Paris. J'ai pourvû Arcambal (qui est parti de New York pour Nantes) de piéces qui je crois auront un grand poids, je n'ecris pas à personne, ny á mon beau freré, je n'en ai pas le temps & je n'aimé point à confier rien à des bâtiments frettés. Adieu, tout à vous pour jamais.

Baltimore 4th July, 1806.

Mr. John Duhalty, at Bordeaux.

SIR,

THE purpose of this letter, is to acknowledge the receipt of yours dated 25th April, which I have not time to answer by this opportunity but shall do so very speedily.

I have the honour to be,
Sir,
Your most humble servt.
MANICLE.

TRANSLATION OF THE LETTER IN SYMPATHETICK INK AS EXHIBITED AT HALIFAX.

MY dear Da. I shall not trouble myself with writing to you at great length, by this opportunity, I have no letter of yours to reply to, as you suppose me set out for your place. Friend

R—— communicated to me the substance of your letter of 17th April, which partly concerns me.

In the hogshead No. 36 under the tail of the J, you will find in the head, the authenticated copy of the discharge upon the security of the shipment at the Isle of France of the Ck.* the original was sent you by friend R. with whom you will settle for the 101 bags cocoa on board the Venus, the freight of which on the back of the bill of lading is £37 5s. 1d, add to this 5 pr. cent average damage, and it will give the amount of the freight of that article. The 23 barrels of sugar belong to James Chaytor, and the freight is £13 17s. 10d. which you will place to his account, and the remainder of the goods is mine. You will give me credit for the nett produce of these 23 barrels. You will perceive by the enormous freight which I am obliged to pay for the Venus, the difference between New York and this place. R—— informed me that the freight from your port to New-York was only £45 sterling. God grant that my Vigilant which was spoken with half way over, after being 12 days at sea, may have arrived in safety, and that her cargo may have come to a tolerable market; if the Venus should also be lucky, you will have according to my calculation, a large sum of mine in your hands, and my last will is, that you freight the Venus, if indeed you can procure that small vessel for the current freight, and that you load her without loss of time for my account with good new wine in hogsheads, with two iron hoops, and only 8 or 10 hogsheads of superior old wine, 500 cases red wine well flavoured and good, not to come higher than from 12 to 13. 10*fcs*; 500 cases white wine, well fined and good and at the same price; 100 tierces white wine, well fined; 100 boilers assorted in their dimensions; 200 baskets oil of the very first quality; 200 boxes of fruits in vinegar; 100 baskets of fruits in brandy; some corks long and superfine, and none other; some bags of corks for demi-johns; some demi-johns; 50 pipes of good brandy; some trunks of neat womens' shoes, they should be a little

* The Chesapeake vid. p. 204, post.

more covered and the ends not pointed; and in fine, if there be a surplus of funds, send me wide and narrow brittannias superfine of the butterfly thread; the finest of lawn; in short, an assortment of fancy goods of the first fashion, proper for the consumption of this country or of the colonies, for to sell here is in my opinion a good thing, and I see our shop keepers obliged to go to New York to procure such goods of which Richaud must have given you accurate information: if there be no appearance of peace, freight a large vessel and force the article of wine, boilers, in fine, commodities fit for the colonial market; if on the contrary, there be a probability of peace, confine yourself to sending only brandy and fill the void places with boxes.—I will not draw upon you, and I entreat you to remit me by one or more vessels you shall freight, the whole of my property, but in God's name lose not a moment—if peace should be concluded, one might lose one's capital on wine, &c. whereas brandy would rise. *Give me speedy notice, and antidate* in those informations, the probable departure of vessels, that the ensurance may be obtained on easier terms as to premium on account of the season.* In freighting a vessel on account or accounts of sale of goods, enhance the prices of the sale that the remittances you make me may appear to be the returns of the goods which I have consigned to you, for a vessel on freight is more liable to be taken than mine are, and the Court at Halifax is abominable. For instance, the goods by the Vigilant will appear the returns of the outward cargo, and the goods of the vessel to be freighted, will appear the balance of the Vigilant, and the produce of the goods of the brig Hanna and the Venus; but take care to make all the papers which shall come by the Vigilant totally with those of the vessel you freight: for it may be possible those two vessels may be carried to Halifax, and in that case it would be requisite that the whole should be consistent; write to La Manicle. Do not expose papers in the mails; put in them only the discharge on security, and take not upon you the

* In further proof of the inaccuracy of this translation it may be added, that there is no word in the French language which answers to the word *antidate*.

charge of letters which require concealment. I send you a letter for Ch. and O. Durand. I wish to hear that you have finished with them for my concern.

The Robert is not yet arrived here, nor the vessel in which comes thy dear uncle. R—— has promised to bring him here immediately on his arrival. I shall have much pleasure in embracing those two good friends. You will act with great caution in respect to the nature of the returns. Inform yourself correctly whether there be not a probability of peace, for I repeat it, wine might ruin one.

The brother of the physician Chatard will call upon you for some money to pay for some books which he has ordered of him, pay the demand, place it to my account, remit me a note of it, and send the books to me.

On second thoughts, peace or war, if brandies be at a low price, in a word, such as calculating all charges, freight, ensurance and duties here, would allow one to profit somewhat by disposing of brandy 4th proof at 100 or 120 cents, I believe it would be the best remittance; and I think too that if you could freight a large vessel to go to Rochelle and take in there from 300 to 500 pipes of brandy, however, that quantity arriving in two different vessels would answer better—the brandies might be purchased beforehand by the house of Garesche of Rochelle and the vessel sent thither to take them in.

My thoughts run constantly on brandy, because in the present situation of Europe, the war in my opinion cannot last. I say nothing of my affairs at Paris. I have for one Arcambal (who has set out from New York by the way of Nantz) documents which I believe will have great weight. I do not write to my brother-in-law nor to any body—I have not time and I do not like to trust any thing to vessels on freight—adieu, ever yours.

(Signed) JOHN CARRERE.

A faithful translation.

ARCHD. GRAY.

Sworn to before me the 4th day of September, 1806.

CHARLES MORRIS, *Register.*

☞ The shipment mentioned at p. 200 and 217 *ante*. was from Bourdeaux to Baltimore and not to the Isle of France as it was stated in some of the impressions before the error was discovered. It may not be amiss to give a further explanation of this, apparently suspicious, though really innocent, circumstance.

In order to induce neutrals to supply their colonies, the French government had passed a law permitting neutrals to ship merchandize of the growth or manufacture of France, without paying export duties. The shipper was obliged to enter into a bond to exhibit, within a year, proof that the cargo had been landed in a French colony. Mr. Carrere's correspondent had entered into such a bond on account of the cargo of the ship Chesapeake which belonged to him. The vessel arrived in Baltimore, where the cargo was landed, stored, and advertized for sale in the usual manner. Not being able to dispose of it, Mr. C. re-shipped it, excepting 62 pipes of brandy, for the Isle of France. The paper found in the hogshead No. 36. was nothing more than a certificate, *acquit à caution*, of the landing of the cargo in the Isle of France. It was necessary that this document should be sent to France in order to discharge the bond in which Mr. C's correspondent had entered.

Circuit Court of the United States.

PENNSYLVANIA DISTRICT, April Term, 1809.

Odlin *vs.* the Ensurance Company of Pennsylvania.

The following case was stated for the opinion of the Court.

THE plaintiff caused ensurance to be made at the office of the defendants by a policy dated the 21st of December 1807, upon the *schooner Hazard*, valued at 3500 dollars for a premium of 5 per cent. *at and from Philadelphia to Havana* prout policies and warranties. The policy was duly sealed by the defendants, the premium paid by the plaintiff, and the vessel is American property. The vessel with a valuable cargo on board cleared out at the Custom House of Philadelphia on the 21st December 1807, and sailed on the voyage ensured, but owing to head winds was obliged to stop at Reedy Island in the river Delaware, and while lying there waiting for a wind, she was arrested, stopped, detained, and prevented from proceeding by the officers of the revenue cutter, acting under the authority of the President of the United States in pursuance of an act of the Congress of the United States entitled, *An Act laying an Embargo on all ships and vessels in the ports and harbours of the United States*, passed on the 22d day of December 1807, which act was received and promulgated by the collector of the port of Philadelphia on the 24th of December 1807. The said officers took away all the ship's papers.

Being so as aforesaid prevented from proceeding on her intended voyage, the said schooner lay at Reedy Island until the day of when she was ordered to the city of Philadelphia, by mutual consent of the plaintiffs and defendants without prejudice to the rights or pretentions of the parties in any respect, and has since been sold by the same mutual consent for the benefit of whom it might concern. The plaintiff having received information of the said vessel being so prevented from proceeding on the 29th December 1807, communicated the same to the defendants on the next day, and repeated the notice on the 8th of Jan. 1808, and on the day of abandoned to the defendants and claimed payment for a total loss. The question submitted to the Court is, whether on the facts stated, the plaintiff is entitled to recover for a total or partial loss, or whether the defendants are entitled to judgment.

The case was argued much at length and with great ability by Hopkinson and Dallas for the plaintiff, and by Rawle and Lewis for the defendants.

Washington, J. delivered the opinion of the Court. The question is whether the embargo imposed by the government, to which the ensurer and ensured belong, subsequent to the commencement of the risk, furnishes a legal ground of abandonment. The question is thus generally stated, because it will be necessary to inquire, 1st. Whether such an obstruction is within the perils of *arrest, restraint and detainment, of Princes, &c.* and 2dly. Whether, if comprehended within those expressions, such a contract be repugnant to any principle of law. It is admitted that this precise case has never received a judicial decision in any of the Courts of Great Britain or of the United States,

although it has frequently been glanced at by the judges, from whom, however, nothing beyond hints of their opinions can be collected. We are sensible of the difficulty of the question as well as of its importance to the parties in this and other similar cases.—We derive consolation, however, from reflecting that our opinion, if wrong, is subject to revision elsewhere.

The first question to be considered is, whether a domestick embargo amounts to an *arrest, restraint,* and detainment of the government. That the expressions used in the policy are broad and strong enough in themselves to include the case of embargo generally, can scarcely be denied, and is established by the decisions which have taken place in relation to foreign embargoes. Still, however, the question remains whether an exception is to be implied in relation to an embargo, imposed by our own government upon the ground stated by *Valin* that no person is presumed to guaranty the acts of his own Prince without an express stipulation. How it should happen that this question should never have occurred in England, it is impossible for us with any certainty to determine.—This circumstance has been laid hold of by each side in this cause, and each has endeavoured to turn it to his own advantage. Arguments derived from this source in general cut both ways. Although neither can rely upon it as decisive in this case, we think the pretensions of the ensured to the benefit of it is best founded for the following reasons. It is believed that he is quite as apt to claim in every case where there is a chance of success as the ensurer is to resist; perhaps more so. It is not probable that the former would easily surrender a right for which the general expressions of the contract seem to afford at least a plausible ground, unless there were some evidence of a u-

sage to qualify and restrain the literal construction.—It is much more likely that the latter acquiescing in the natural import of the expressions would be induced to pay the loss without perceiving that on principle there could be a distinction between a foreign and domestick embargo. Another reason and one which has no inconsiderable weight with the Court is, that this seems to have been the opinion of the French Jurists; and although they may have been founded upon positive ordinances, yet it is probable they would be in this, as we know they have been in other instances, regarded by commercial men as evidence of the general law of merchants, upon this subject, no judicial decision and no custom appearing to the contrary. The sea laws and state ordinances of many of the maritime countries of Europe, have, with some exceptions, gradually became incorporated into the commercial laws of England, by a kind of tacit adoption, and are in those cases considered as evidence of the custom of merchants. These regulations are read in the British and American Courts, and have frequently furnished rules of decision, where the positive law of the country, or former decisions upon the point, had not prescribed a different one. Without taking time to go through in detail the different passages from Roccus, Le Guidon, Valin, Emerigon, and Pothier, we think it may fairly be deduced from what they say, that if a vessel be detained by an embargo, or other temporary restraint laid on by the authority of the French government, *after the risk has commenced*, the ensured may abandon; and the passages where they appear to differ, may be reconciled by considering them as sometimes speaking of a restraint imposed *before*, sometimes *after* the risk has commenced, or differing upon the point whether the words "*commencement of the*

voyage" in the ordinance of Louis XIV. mean what they express, or, *commencement of the risk.* These opinions taken in connexion with the unqualified expressions of the contract itself, create a presumption which is almost irresistible, that the absence of a positive English authority upon this subject has arisen from a general understanding among merchants and underwriters, that a domestick embargo, equally with a foreign one is a peril within the words of the policy.

In a case where no authority is to be found, the opinion of men learned in the law, and the *dicta* of judges, which in other instances should be relied upon with great caution, may not be improperly resorted to as corroborative evidence of the law. These will now be noticed. Much greater reliance might be placed on the *dictum* of lord Holt in *Green* v. *Young** if it had been purely a case of embargo; yet it is quoted by Park and Marshall as if the other circumstances of the case had not influenced the opinion. In *Rotch* v. *Edie*† it is obvious that lord Kenyon as well as the counsel on each side were not impressed with any distinction between a foreign and a domestick embargo. For the judge after stating that *Roccus, Le Guidon, and Green* v. *Young* are upon examination all one way, and that in favour of the assured, concludes by saying, that as to a domestick embargo there would perhaps be but little difficulty in deciding it. There can exist very little doubt on which side the inclination of his mind was. In *Goss* v. *Withers*‡ the expressions used by *lord Mansfield* are certainly very general, and although *Park* and *Marshall* have both pressed them into the service to support their opinions, it is not clear that he had in his view a domestick embar-

*2 Ld. Ray 840. †6 Term. Rep. 413. ‡2 Burr 694

go. In the case of *Hore* v. *Whitmore** there is every reason to infer that the opinion entertained by the bench and bar, was that a domestick embargo affords a cause of abandonment; because if the contract in that case was either suspended or put an end to as a consequence of that circumstance, it was perfectly immaterial whether the warranty had been complied with or not. In neither case could the ensured have recovered. In addition to all this, the opinions of Park and Marshall in favour of the right of abandonment are deserving of respect.

The cases relied upon by the defendants' counsel will be examined hereafter. At present it seems proper to inquire whether this construction of the contract is opposed to any principle of law, or to the sound policy of the nation. It is stated on the part of the defendants as a general rule, that where a contract is lawful at the time it is made, and a law afterwards renders a performance unlawful, neither party shall be prejudiced, but the contract shall be considered as at an end. This as a general rule will not be controverted. But there is an obvious distinction between a law which renders the performance unlawful altogether, and one which merely *suspends* the performance, without condemning the subject of the contract. If the trade between this country and any other be wholly interdicted, or partially so in relation to particular articles, or if after the contract to carry goods from this to that other country, war should break out between them, the subject matter of the contract becomes unlawful; the prohibition acts directly upon it and forbids the performance. It is no answer that the prohibition may, upon a change of circumstances be re-

* 2 Cowp. 784.

moved; the prohibition defeats the contract and releases the parties from all its obligations. But in the case of a temporary restraint upon the performance of the contract, the subject matter of it is not declared to be unlawful; the trade itself is not condemned; the legality of it is rather admitted; but it is not permitted to be performed for the present. Here the rule applies, that if a law forbids performance of a contract in part only, he who is bound by it must still perform what he lawfully may. In the case of an embargo for example, the ship owner is disabled from commencing his voyage at the specified time; but he is bound to go when the prohibition is removed. A strict performance is prevented by law, and the law excuses it. What is an embargo. In its nature and design it imposes a temporary restaint; it is a measure of precaution and state policy, intended by the government either to distress some foreign nation or to protect the property of its own citizens. It is true that the embargo imposed by our government in December, 1807, was unlimited as to time by the terms of it, and the concurrence of the executive and legislative branches of the government was necessary to remove it. But it was still an embargo. It suspended our intercourse with foreign nations, but did not declare or mean to declare that intercourse in itself unlawful. The British embargo imposed on the 27th July, 1796, in relation to Tuscany was to continue *until the further order of the council*, and the Russian embargo was made to depend for its continuance upon the compliance of Great Britain with the convention on her part in respect to Malta. Both were dependent upon events which the governments imposing them could not controul, and the former did in fact continue between two and three years. Yet the nature and essence of the

measure was not changed. They were considered as temporary restraints which did not avoid but merely suspended the performance of contracts upon charter parties and for seamen's wages; the only cases which were brought judicially into discussion.

Let us now see whether a contract by one person to indemnify another against a loss arising from an embargo, which the government to which the parties belong may, at any future time impose, be inconsistent with the sound policy of the nation. If it be, it is admitted to be void. If such a contract be made pending the existence of the embargo, it is clearly void; because unless it is meant that the vessel should sail in defiance of the embargo, the contract itself would be nugatory. We do not speak of contracts to be performed after the restraint is removed. We can see no good reason why one man may not for valuable consideration and in relation to a real transaction concerning property, agree to stand in the shoes of another, as to any loss which may result to that other in case a measure of this sort should be adopted by the government. The effect of an interest created in one man by such a contract in opposition to the measure itself, is too remote as to its influence upon the conduct of the government, to be regarded. If a contract can be avoided because it may possibly become the interest of one of the parties at some future day to oppose the passage of a law which may then be thought beneficial to the state, it is not easy to foresee all the consequences of such a principle; because there is no supposable subject concerning which a contract may be made, which may not at some time or other become also a subject of legislative consideration, and it can seldom happen that any interference of the government in relation to that subject would

be equally beneficial to both parties. In the case of *Hadley* v. *Clarke** the contract of affreightment raised as strong an interest in the ship owner in opposition to the embargo, as if he had bound himself to indemnify the freighter against it. Yet this circumstance was not even thought of by the counsel who argued in opposition to the obligation of the contract. In *Touting* v. *Hubbard* † which respects the embargo laid by Great Britain on Swedish vessels; lord Alvanley declares in the most unqualified terms, that a common embargo does not put an end to *any contract* between the parties, but that it is to be considered as a temporary suspension of it only, and that the parties must submit to whatever inconveniences may arise, *unless they have provided against it by the terms of their contract.* He goes on to state the principle of *Hadley* v. *Clarke* to be, "that an embargo is a circumstance against which it is equally competent to the parties to provide as against the dangers of the sea." Now it is apprehended that in this case, the effect of the American embargo is provided against by the general terms of the policy, and these cases declare explicitly that such a provision is lawful. Neither is it perceived by the Court that an ensurance against a domestick embargo has a tendency to induce a violation of the law in case it should be enacted. If the ensured be at liberty to abandon, and to recover his indemnity, every temptation to a breach of the law to which he would have been exposed if not ensured at all, or if he were not at liberty to abandon, is taken away. If he were even bound by a warranty to depart by a certain day, still it could not be his interest to violate the embargo, because, by doing so, he would lose the benefit of the policy as certainly as he would have done by

* 8 Term. Rep. 259. † 3. Bos. and Pul. 291.

lord Mansfield against the validity of such a wager. The latter case was a wager upon a boxing match, the illegality of which cannot be questioned. It will be found very difficult, we think, to reconcile the principle admitted in *Lacaussade* v. *White* with that laid down in *Jones* v. *Raddall*. *Cowp.* 57. There is, however, this difference between the former case and that now before the Court. That is a mere gambling contract and no injury could arise to either party by declaring it void. This is a contract of indemnity against a real loss of property which a certain measure of government might produce.

Upon the most mature consideration which it has been in the power of the Court to give in this cause, we think that upon legal principles, upon the reason and policy of the thing, and upon a fair construction of the contract, the plaintiff is entitled to recover for a total loss.

Decisions in England on the same subject.

The Court gave judgment in the case on the American embargo, on Thursday last.

As they had not given previously any information of their intention to give judgment on that day; and, as it was the last day for delivering declarations of the last term, it so happened that I was not down in Court when judgment was given. But I found on inquiry, that the ground of giving judgment for the defendant in MAURY *vs.* SHEDDEN, was that when any act is done by the government of any country, it is to be considered in the same light as if all the subjects of

the country had individually concurred in doing the act; and as the plaintiff could not have recovered upon a policy when he had personally occasioned the loss, against which he sought to be indemnified; so, neither could he recover where his government had occasioned it; for that he was indentified, with his goment and the consequences as to third persons, were to be considered in the same point of view as if he had himself contributed to laying on the embargo.

The two other cases of CONWAY and DAVIDSON *vs.* FORBES and CONWAY and DAVIDSON, *v.* GRAY which were ensurances by British subjects, who were consignees of cargoes shipped by American subjects, and upon which they had accepted and paid bills drawn on account of the cargoes, depended in part upon the same general principles as that of *Maurey* vs. *Shedden*; but it was contended that there was a destination in favour of the plaintiffs, on account of their having a beneficial interest as consignees, of the cargoes, and having paid bills upon them. But the Court thought that the destination would not bear them out; for the ensurance must be considered as being substantially made on account of the owners of the cargoes, who were Americans; and that the plaintiffs should not afterwards apply a policy which was originally made for the benefit of other persons to their own purposes, merely because they had obtained a subordinate interest in the cargoes by paying bills upon the faith of their coming into their possession and controul. They said if the plaintiffs had specially ensured their interest as consignees, as a distinct subject of ensurance unconnected with the general ownership of the cargoes, it might have admitted of a different consideration; but that they would give no opinion upon the effect of such en-

surance; and that was not the case where the ensurance was general.

(Signed) J. LITTLEDALE.

Gray's Inn, Feb. 15, 1809.

DAUPHIN COUNTY, PENNSYLVANIA.

AT a Court of Common Pleas, held at Harrisburgh, for the county of Dauphiu, the 13th day of September, 1806, before the hon. John J. Henry, esq. president, and John Gloninger, esq. one of the associate judges of the same Court.

The President, Managers and company of the Lancaster, Elizabeth and Middletown Turnpike Road,
vs.
Thomas Stubbs, a Stockholder in the said road.

Amicable action, $200. It is agreed, that judgment be entered for the above sum, subject to the opinon of the Court.

Whether under the act of assembly, incorporating the said company, passed the 5th of March, 1804—Thomas Stubbs, a stockholder in the said road, can be compelled to pay the different proportions of his several subscriptions as they become due. And if the Court should be of opinion that the several proportions can be recovered, that then judgment be entered for the plaintiff; but if the Court should be of a contrary opinion, then judgment to be entered for the defendant.

On motion and argument, judgment for the PLAINTIFFS.

Bills of Exchange in South Carolina.

Winthrop, *vs.* Pepoon, Otis and Company.

AN action will lie on a bill of exchange protested for non-acceptance, although the time for payment be not expired.

The *lex loçi* where the bill is drawn, is the rule both for interest and damages on bills. The damages on bills in South Carolina which have been returned from foreign countries beyond sea is fifteen per cent, with the difference of exchange and *ten* per cent on those, which are returned from any of the sister states. The *custom of merchants* in Boston *seems to be,* to allow three per cent on inland bills protested.

On a motion for a new trial. The case appeared to be, that a bill of exchange was drawn by a partner in Boston, on his co-partners here, which came into the plaintiff's hands by indorsement. On the bill being presented, it was presented, and, of course, protested for non-acceptance. On which a suit was shortly after commenced, but before the time of payment had expired.

Ward, for the defendants, took too grounds: 1st. That the verdict in the former trial was against the law of merchants, inasmuch as it was founded on a protest of the bill in question for *non acceptance*; and the suit commenced upon it before the time of payment had expired. 2ndly. That the Jury had taken upon them to allow ten per centum damages; which was neither allowed of by our act of assembly, nor any established usage or custom of trade.

N. B. The new trial was ordered in this case, not on account of any difficulty on the first part, but in order to have the point of damages established by a Jury of merchants.

Upon the first ground, the Court were clearly of opinion, that the action lay upon the protest for non-acceptance, although the time for payment of the bill was not expired. Every man by the law of merchants, who draws a bill, undertakes, by the very act of drawing, that the bill shall be *accepted* and *paid*, when at maturity, agreeable to the terms of the bill. And the very end and design of a protest, is, to give *notice of non-acceptance;* or, if accepted, of *non-payment;* in either event, the drawer becomes liable. And the holder in case of a protest for non-acceptance, is under no obligation to wait till the time for payment expires; because the drawer has broken part of his original contract—that is, that the bill should be accepted. And because also, if the bill should even be paid when due, the holder would lose the benefit of the credit in trade, which the acceptance of a bill would give him, as well as the use of the money, which he might obtain at a small discount. The obligation in every such case, would be on the part of the defendant, to show that the bill was afterwards paid, which might be given in evidence by way of mitigation of damages. But in this case, no payment, even at this day is alleged; therefore, the plaintiff is entitled to a recovery. *Doug.* 55. 3 Will. 17. Kyd. 17.

2. Upon the second point, the Court had some doubts about the *quantum* of damages which ought to be allowed. Our act of Assembly for ascertaining damages on protested bills of exchange, allows fifteen *per cent* on all bills returned from foreign countries beyond sea, with the difference of exchange; and ten

per cent on bills returned from any of our sister states. But it is silent as to the damages to be recovered on bills drawn, either in a foreign country, or in any other state, and sent for recovery in our Courts in Carolina, as in the present instance. Therefore, in the former trial, the Court left it to the Jury, either to govern themselves by the reason and analogy of our own state law on the occasion, which they thought a good rule, or to make the *lex loci*, or law of the place where the bill was drawn, their guide, if they could ascertain what that was. Accordingly the Jury found ten *per cent* damages, which is the same as allowed on bills drawn here and returned protested. As the parties, however, expressed a dissatisfaction at this verdict; and as it was a new case, the Court had directed a new trial before a special Jury of merchants, who were now finally to settle this point; and therefore left it again to the Jury now sworn, either to make our Law on the subject their rule, or the Law and customs of Massachusetts where the bill was drawn, as they thought most agreeable to the Law of merchants.

The Jury then retired, and next morning returned their verdict for the amount of the bill, with interest and three *per cent* damages, agreeably to the custom of merchants in Boston, on inland bills protested.

This, therefore, may be considered as establishing the Law on this point, and making the *lex loci* or Law of the place where the bill is drawn, the rule.

Pennsylvania District Court.

Fogerty, Mate, Complainant, vs. *Pratt & Kintzing, owners of ship Atlantic, Respondents.*

MARINERS WAGES, 6 Jan. 1809.

Peters, jun. for complainant, and J. Ingersoll, for respondents.

PETERS J. At Norfolk in Virginia, the ship was discharging stone ballast. A flat bottomed scow was used as a lighter, to convey the ballast to the Strand.—The ballast was thrown into the scow from buckets, in which it had been hoisted out of the hold. These were borne to and off the side of the ship; both mates, at times, assisting. They were discharged into the scow lying along side at random, and their contents left to find their own position in the scow, or part to fall into the sea, as chance directed. No pains or care were taken to trim the scow which had a considerable list towards the ship's side; and was so left, with about six inches freeboard when the mate, second mate and all hands went to dinner. After their meal, they proceeded to discharge the ballast in the mode which had been previously pursued. Three buckets being (after dinner) emptied into the scow, she began to take in water; and not till then, did the mate (who commanded in the captain's absence) direct measures to be taken for trimming the ballast in the scow, though a hand might have been spared for that purpose from the commencement of her lading. She went down and was lost soon after the discharge of the third bucket. The mate's idea was, that the scow, before

any danger occurred, could be turned round, so that the off side might receive more ballast, and settle her on an even bottom. He viewed from time to time her situation; and so did the second mate, and most, if not all of the crew, though generally engaged at the tackle fall. No apprehension of danger was expressed on going to dinner, or at any other time, by any person. The second mate and some of the crew who were witnesses (under releases from claim of contribution) now declare, that the scow was injudiciously laden, and that a hand should have been kept in her constantly to trim the ballast. Being asked why they did not remonstrate at the time against the mode taken to lade the scow, they replied, that "the mate "was in command; and they had no right to inter-"fere; especially as he had high notions of his autho-"rity." He appeared to have been a strict, and therefore not a favourite officer.

The respondents set up a claim to the value of the scow lost, against the mate solely. The complainant's counsel contended that it was either a loss by unavoidable accident, for which neither the mate nor crew were responsible; or, if gross negligence appeared, or misfeazance, there should be a general contribution.

It was difficult to determine whether the mate was solely amenable and in fault; though I had no doubt as to the injudicious mode of loading the scow; which should have been more carefully attended to, as it was the first attempt to load this lighter. If the 2nd mate, or any of the crew had deemed (as the former said he had) this mode of lading the ballast uncommon, or dangerous, it was their duty to have represented the matter to the mate. If they had so done, and he had persisted, it would indubitably have been at his sole

risk. By not thus representing or protesting against it, they took their share of risk and responsibility.— It is a mistaken notion among mariners (many of whom are disobedient enough in plain cases) that they are compelled unconditionally to obey all orders.— This is not seldom an affectation of strict duty; and they obey orders evidently wrong, or perceive in silence ruinous omissions, when the consequences are the exposure of officers they dislike. But this is a nice and dangerous game. If a casualty producing loss occurs, they share in the retribution; notwithstanding such insidious obedience, and hypocritical delicacy. They are bound, by a superiour duty, to guard the property of the owner. The law thus reconciles obedience with justice, by making it their duty to remonstrate and warn on proper occasions, before they obey; under the penalty of sharing the consequences. But if they give due warning and information they are free from participation in retribution for loss. Thus it has often been decided here,* in cases of bad stowage, bad ropes, or other defective tackle and furniture. Their remonstrances are not to be considered as impertinent interferences; but just and warrantable exercises of their rights and duty.

In the case in question, no warning or opinion was given; and the whole were thus inculpated. An officer may err in judgment, without perceiving the consequences. It is the interest as well as the duty of those who must respond with him to the owners, at least to endeavour to set him right. If he persists in errour, it is solely at his own peril. There have been

* See Admiralty decisions in the District Court of Pennsylvania, p, 258, 263, &c. for the general duties of Mates. *Wilson, Mate,* vs. *brig Belvidere.* Ib. 243, as to claims of exceptions from contribution, and vide 240, 260, as to the duty of seamen to remonstrate.

cases of exception to this rule, attended with special circumstances. If, in this case, the lighter had been (as was alledged but not proved) rotten and incompetent, the owner or his agent, must have suffered the loss. The officers and crew would not have been liable to contribution, unless they, or some of them, knew the circumstance, and failed to warn or remonstrate to the master or mate, who in such cases, may be ignorant of the deficiency. The general contribution is first regarded. Strong circumstances must exist to charge an individual; and those of this case do not seem to be so strongly marked as to warrant an exception. At least, doubted whether the proof amounted to errour in judgment or *erasa negligentia*. But being clearly of opinion that there had been *misfeazance*; and no warning or protest, I deemed it right to retribute the owner by general *contribution*. This must be made in the ratio of wages. The master and the whole of the ship's equipage, must contribute.—Where the fault is not clearly fixed on an individual, the obligation of the whole to retribute the owner predominates; and prevails against any allegation of innocence, as to any one or more of the officers or crew. This may bear hard on the faultless; but it is the policy of the maritime law, thus to compel the innocent to watch, and bring to retribution or punishment, those who are really chargeable with negligence, delinquency or crime. This obligation arises out of a peculiar necessity, appropriate to those of this occupation; who, from the nature of their employment, are thus made sponsors for each other.

An Analysis of the Insolvent Laws of Pennsylvania,

By an Act of Assembly passed on the 4th of April, 1798, revived by an Act passed on the 26th day of March, 1808, it is provided:

§ 1. ANY debtor, having been an inhabitant of this State for two years next before his application, may apply by petition in writing, to the Judges of the Supreme Court, or to the Judges of the Court of Common Pleas of the county where the debtor resides, in term time, and offer to deliver up to the use of his creditors, all his property, real, personal and mixed, to which he is in any manner entitled, a schedule whereof (on oath or affirmation) together with a list of his creditors, so far as he can ascertain them and the nature of their debts, shall be exhibited with and annexed to his petition. Thereupon the Court may direct personal notice of such application to be given to the creditors, or so many of them as can be served therewith, or direct notice of such application to be published in the public newspapers, for such time as the Court may think proper. On the appearance of the creditors, or their neglect to appear on notice, at the time and place appointed, the Court may administer the following oath or affirmation, to the debtor making such application: "I, AB, do swear, or solemnly, sincerely, and truly declare and affirm, that I will deliver up, convey and transfer, to my creditors all my property, that I have or claim, any title to or interest in at this time in the world, and all debts, rights and claims, which I have at this time, or that I am in any respect entitled to, in possession, rever-

"sion, or remainder, and that I have not, directly or "indirectly, at any time before, given, sold, convey- "ed, leased, disposed of, or entrusted any part of my "property, rights, or claims, thereby to defraud or de- "feat my creditors, or any of them, or to secure the "same, to receive or expect any profit, benefit or ad- "vantage thereby."

§ 2. The insolvent shall, thereupon, exhibit to the Court, a just and true account of his debts, credits and estate, real and personal; containing a statement of his losses, and the means whereby he became insolvent; and shall satisfy the said Court, that he has not concealed or conveyed to any person or persons whatsoever, to the use of himself or any of his family or friends, or whereby to expect any future benefit to him or them, any part of his estate, effects or credits; and shall answer all and every such questions or interrogatories, touching his estate and losses, by word or in writing, as shall be put to him by the Court, touching his estate or losses aforesaid; and, if upon such examination, there shall not arise strong presumption of fraud, the Court, whether sitting at its regular sessions, or at *nisi prius*, or at adjournment, shall appoint such trustee, or trustees, on behalf of the creditors, as two thirds in number and value of the creditors, who are then attending, either in person or by attorney, shall nominate, or in case the creditors shall not attend, or not nominate any trustee, then such trustee or trustees as the Court shall think proper, and shall direct the debtor to execute a deed to such trustee or trustees for all his property, debts, rights and claims, in trust for his creditors, and upon the execution of such deed, the Court may make an order, that the debtor shall not at any time thereafter be liable to imprisonment, by reason of any judg-

ment or decree obtained for payment of money only, or for any debt, damage, cost, sum or sums of money, contracted, accrued or occasioned, owing or becoming due before the time of such assignment, and such order shall be a sufficient warrant to the sheriff, goaler, or keeper of the prison, where any such debtor shall be then imprisoned, to discharge the said debtor.

§ 3. Provides, That every trustee, before he acts, shall give bond with security to the Commonwealth, in such penalty as the Court shall direct for the faithful performance of his duty, and in case of his refusal, or delay to act, or of his death, the Court are authorized to appoint another in his stead.

§ 4. Exempts the necessary wearing apparel and bedding of the debtor and his family, and if a mechanic or manufacturer, his tools, not exceeding in value $50.

§ 5. Authorizes the trustees in cases of dispute or controversy with the debtors of the insolvent, to compound by arbitration or otherwise, and all such debtors are to have the benefit of a defalcation, where there are mutual debts, in like manner as in other cases.

§ 6. Provides that the trustees shall collect the debts, and sell and convey all the real, personal and mixed property of the debtor, for the best price that can be gotten for the same, and distribute the net produce, after paying all expences attending the execution of the trust, and deducting the commissions of the trustees, to and among the creditors, in proportion to the amount of their debts.

§ 7. Authorizes the trustees to sue for the recovery of any property of the debtor in their own names; and provides, that suits commenced by the debtor, before his discharge shall not abate.

§ 8. Provides that the trustees shall appoint a time and place for receiving the proofs of the creditors, in support of their claims, and for the distribution of the debtor's estate, and shall finally close their accounts at such time, not less than three months nor more than twelve from the date of the assignment, unless the same shall be enlarged by order of the Court, after which time every creditor is barred from claiming any share in the distribution of the estate; except a suit may be depending or any part of the estate may remain undisposed of, or any future effects or estate of the debtor may be received, in which cases the trustees are, as soon as possible, to convert the estate or effects into money, and distribute the same within three months after among the creditors. Due and full notice shall be given of the several times and places of the meetings of the trustees for the purposes aforesaid, by advertizement in at least two of the public newspapers in the city of Philadelphia, and one nearest to the place where the debtor usually resides, for four several weeks at least, before such days of meeting.

§ 9. If any person, with intent to defraud all or any of his creditors, shall collude or contrive with the debtor for the concealment of any part of his estate or effects, or for giving a false colour thereto, or shall contrive, or concert any grant, sale, lease, bond, acknowledgment, or other like proceeding, either by parole or by writing, or shall become a grantee, purchaser, lessee, obligee, or other like party, in any fraudulent intent, act as broker, scrivener, factor, agent, or witness, in any proceeding as aforesaid, such persons shall, on being duly convicted according to Law, forfeit and pay a sum not less than 50 dollars nor more than 10,000 dollars, and shall suffer imprisonment for

a term not less than three months, nor more than two years, and shall moreover, forfeit all claim which he may have to any part of the estate of such debtor.

§ 10. If at the time of the appearance of the debtor and his creditors before the Court, or at any time within seven years thereafter, any creditor or other person shall by oath or affirmation show to the Court, or any judge thereof, or to any justice of the peace of the proper county, in vacation, any good cause to suspect that such a debtor hath directly or indirectly sold disposed, &c. any part of his property, or any part of his debts or claims, thereby to secure any benefit to himself, &c. or to deceive or defraud his creditors, the Court, Judge or Justice shall bind him over to appear at the next Court of Quarter Session, to answer for the same by indictment; and all proceedings for the relief of the debtor, if pending, shall in the meanwhile be stayed, and upon conviction the debtor shall be sentenced to imprisonment at hard labour, for a term not less than one, nor more than three years.

§ 11. At every meeting of the trustees for the purpose of making dividends, creditors may prove their debts; every trustee shall produce on oath or affirmation his accounts, and after deducting expences, &c. divide the balance among the creditors who have proved their debts, proportionably.

§ 12. The surplus, after paying creditors to be restored to debtor, and any estate not sold to revert to him.

§ 13. The commissioners to the trustees shall be such, as the Court shall direct.

§ 14. If any debtor in vacation shall be arrested in execution, and shall apply by petition, to any judge of the Supreme Court, or the president, or any* two

* Second Sect. of the Reviving Act.

justices of the Court of Common pleas of the county where the debtor resides, and give bond to the plaintiff at whose suit he is arrested, in such penalty and with such security as shall be directed and approved of by the judge or judges, to whom the petition is exhibited, conditioned that he shall appear before the Court of which the Judge is a member at the next term, and surrender himself to prison, in case on his said appearance, he does not comply with every thing required by the act to procure his discharge, in the same manner as if he had applied in term time, or if the proceedings should be stayed by information on oath or affirmation as aforesaid, then, that if on trial, the debtor should be found guilty, he shall immediately surrender himself to prison; in such case and on such bond given, the judge or judges may set him at liberty forthwith, by an order to the jailer.

§ 15. Any sheriff, jailer, or keeper of any prison, performing the duties of his office in this respect, may make return of such order which is to be good and effectual to all intents.

§ 16. All proceedings of the trustees, together with the accounts and vouchers exhibited to them, shall be filed among the records of the Court appointing the trustees.

§ 17. If any debtor discharged as aforesaid shall be arrested for any pre-existing debt, upon application to any judge of the Court, out of which the process issues, he shall be discharged. Provides likewise, that the discharge under this act, shall not discharge him from the debt, but that he shall be always answerable, and that the liens against his estate shall not be affected.

§ 18. That * *all persons* that now are, or hereafter shall be in actual confinement in any jail in this Commonwealth by adversary process, and without collusion may at the next term after such confinement, petition to be discharged agreeably to the true spirit and meaning of the aforesaid sections of this act.

§ 19. Directs that the property afterwards acquired by the debtor, shall be liable for the payment of his debts and creditors, may take out new executions, &c. It, however, excepts his wearing apparel, and bedding for himself and family, and if a mechanic or manufacturer, his tools not exceeding in value $50.

§ 20. Limited the Law to the 1st of May, 1801.

By the first section of an act, passed the 26th of March, 1808, the foregoing act was revived and continued in force for one year, and from thence to the end of the next session of the general assembly, which will be about the month of April 1810—It is, however, doubtful whether the ensuing Legislature will continue it longer.

2. The second section of this act gives to one judge the same power as is given to two judges by the 14th section of the foregoing act.

§ 3. It shall be lawful for the Court by whom any insolvent shall be discharged, to decree and adjudge that whenever a majority in number and value of creditors residing within the U. S. or having a known attorney therein, consent in writing thereto, he shall be released from all suit and his estate and property afterwards acquired, exempted from execution for seven years.

* "All persons"—there has been a contradiction of decisions relating to this section. Some of our Courts deciding, that any person in actual confinement may be discharged, while others limit the benefit of the act to persons who have been inhabitants for two years.

By a Law passed on the 7th of April, 1807 and yet in force, it is provided by

§ 1. That the jailer shall be compensated for his fees before any distribution.

§ 2. That it shall be the duty of the several Courts of C. P. at their first term in every year, to fix and order a daily allowance, for all such poor and insolvent debtors as shall or may be confined during the year, and have not property to support themselves; and it shall be the duty of the plaintiff at whose suit he is arrested, his agent or attorney, upon notice given by the keeper of the prison, to pay the daily allowance at the prison every Monday morning, while the debtor continues in prison, on failure whereof for three days, the debtor may apply to the Court if in session, or if not, to a single judge, who upon enquiry and finding him destitute of property for his support, and failure of payment, shall forthwith order his discharge, provided the daily allowance shall not exceed fourteen cents.

CIVIL LAW.

(TRANSLATED FOR THE AMERICAN LAW JOURNAL.)

Continued from Vol. I. page 491.

A Translation of the Fifth Title of the Forty-seventh Book of the Digests, entitled: Furti adversus nautos, coupones, stabulanos.

DIGEST, Book XLVII. Tit. V.

Of the action of Theft against Mariners, Inn and Stable Keepers.

LEX UNICA*.

Ulpianus, lib. 13. Ad Edict.

In cos qui naves. I shall give judgment against the owners, masters and keepers of vessels, inns and stables, if any thing shall be stolen by them or by any person or persons in their employ; whether the theft shall have been committed by the aid or with the privity of the owner or master of the vessel himself, or only by those who are employed under him for the purpose of navigating her.

Navagandi autem. § 1. We mean those who are actually employed in navigating the vessel, to wit, mariners.

Et est in duplum. § 2. This action is twofold:

Cum enim. § 3. For when a thing perishes either on board of a ship, or in an inn, the owner, master or keeper (*exercitor*) is bound by the prætor's edict; so that it is at the election of him whose property has been

* This Title contains but one Law.

stolen to proceed against such owner, master or keeper *honorario jure*, or against the thief *jure civili*.

Quod si receperit. § 4. If the ship master or inn keeper has received the thing *to be safely kept*, then the action of theft does not belong to the owner of the thing stolen, but to him who has undertaken to keep it at his own peril.

Servi verò. § 5. The *exercitor*, however, may liberate himself from the action of indemnity, by delivering up his slave who has committed theft; yet why should he not be punished who admitted on board of his vessel so bad a servant? Why is he jointly and severally bound, when the theft has been committed by a freeman? Unless, perhaps, it be for this reason, that before he takes a freeman on board of his vessel, he ought to be informed of his character; but that he ought not to be charged with the act of his slave, it being a domestick misfortune; provided, he is willing to give him up. If, however, he employed another man's slave, he is liable as for a freeman.

Caupo præstat. § 6. The inn keeper answers for the act of those who are in his house, employed in the service and management thereof, and also for those who dwell therein as *inmates*; but he does not answer for the acts of *travellers*, because he has not the choice of them and cannot turn them out; but of his *inmates* he has so far the choice that he may refuse to take them in, and therefore, he must be answerable for their acts. In like manner the master of a vessel does *not* answer for the acts of *passengers*.

THE

American Law Journal,

AND

MISCELLANEOUS REPERTORY.

.....

BY JOHN E. HALL, ESQ.

OF BALTIMORE.

.....

VOL. II. JULY, 1809. No. VII.

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1809.

TO READERS AND CORRESPONDENTS.

WE invite the particular attention of our readers to the discussion which is commenced in the present number, respecting the claim to the Batture at New Orleans which has lately been advanced by the United States, or rather by Mr. Jefferson. At present it would not become us to animadvert upon the flagrant violation of the independence of the Judiciary and the most obvious principles of jurisprudence which the conduct of the Executive has exhibited. The matter will be presented to the next Congress, where, we hope the dignity of the laws will be asserted, and the individual who has been exposed to this oppression will be protected. We have never seen the opinion of the Attorney-General, and other documents, upon which Mr. Jefferson's orders to the Marshal, to dispossess Mr. Livingston were founded, nor have his pressing entreaties enabled him to obtain a sight of them. He, therefore, contends under great disadvantages. His reply to Mr. Derbigny is a complete detection of some of the misrepresentations which have been employed in the case, and fully refutes the sophistry of that opinion. But if the judgment of any one still be in doubt, if scepticism yet withhold her assent to the justness of Mr. Livingstons pretensions, let the opinions which shall be published in the ensuing number be perused, with an impartial eye. We think no man who can comprehend the force of argument, will fail to be convinced by the lucid and methodical reasoning of Mr. Du Ponceau. The powerful mind of this profound civilian is there exercised in familiar scenes. His logic is "as a hammer that breaketh the rock in pieces," and none can withstand its blows.

We return our thanks to a member of the Virginian bar for a copy of the celebrated decision of JUDGE ROANE on the doctrine of *post nati*. We shall give it an early insertion.

Several other articles must also be deferred for want of room.

Some decisions in the New-York district, under the Embargo laws; and directions as to the manner of proving deeds in that State and in Virginia are received and shall shortly appear.

THE

AMERICAN
Law Journal and Miscellany.

NO. VII.

On the Constitutionality of the Embargo Laws.

UNITED STATES.

MASSACHUSETTS DISTRICT.

DISTRICT COURT AT SALEM, SEPTEMBER TERM, A. D. 1808.

United States, by Joseph Wilson, Collector of Marblehead,
VS.
The brigantine William—Benjamin Ireson & al. Claimants.

DAVIS, *Dist. J.* This libel is founded on the act of congress, passed 22d December, 1807, intitled, "An act laying an embargo on all ships and vessels in the ports and harbors of the *United States*," and on the first supplementary act, passed January 9th, 1808.

The libel alleges, that sundry enumerated goods, wares and merchandize, on the 17th day of March last, on the high seas, were put, from said brigantine, on board another vessel, called the *Nancy;* and also, that other goods, wares and merchandize, on the 11th day of *May* last, at *Lynn*, in said district, were put, from said *brigantine*, on board another vessel, called the *Mary*, with intent, that said goods, wares and merchandize should be transported to some foreign port

or place, contrary to the acts aforesaid, by which, it is alleged, that said *brigantine* is forfeited.

It has been contended, by the counsel for the claimants,

1st. That the facts, appearing in evidence, do not present a case, within the true intent and meaning of the acts aforesaid.

2d. That the acts, on which a forfeiture is claimed, are unconstitutional.

After argument, on these heads, it is suggested, by the counsel for the claimants, that the case may receive material elucidations from the facts that will appear, on the trial of the brigantine *Nancy;* and they pray for a postponement of a decision on this libel, until a hearing shall be had, relative to that vessel. As that case is necessarily continued, and as that of the *Sukey*, also pending at this term, appears to have connexion with the transactions in the case of the *William*, I shall not make up a judgment relative to the *facts* on this libel, until those of the *Nancy* and *Sukey* shall have been tried, or until the further evidence suggested, shall have been heard. But it appears to be necessary to declare an opinion on the constitutional question, which has been so fully discussed, especially as the objection, if available, equally applies to many other cases before the court. Under these circumstances, I have considered it expedient, and indeed an incumbent duty, to give an opinion on this great and interesting question; though an entire decision on the case, in which it was presented and argued, is, for the reasons suggested, postponed.

In considering the several acts, relative to the embargo, as one system, it may be convenient to exhibit an analysis of their contents.

The general, or primary, provisions are contained in the first act, passed *December* 22, 1807; which lays "An Embargo on all ships and vessels in the ports and places, within the limits and jurisdiction of the *United States*, cleared or not cleared, bound to any foreign port or place;" and in the fourth section of the third additional act, passed *March* 12th,

1808, which prohibits the exportation, from the *United States*, in any manner whatever, either by land or water, of any goods, wares or merchandise, of foreign, or domestic, growth or manufacture. To the same head belongs the prohibition of the exportation of specie, by any foreign ship or vessel, by section 5th, of the first supplementary act.

The exceptions to these prohibitions are,

1st. Vessels under the immediate direction of the president of the *United States*.

2d. Foreign ships or vessels, either in ballast, or with goods wares and merchandise on board, when notified of the first act.

3d. Armed vessels, possessing public commissions, from any foreign power, not including in this description, privateers, letters of marque, or other private armed vessels.

4th. Vessels licensed for the fisheries, or bound on a whaling voyage, with no other cargo than sea stores, salt, and the usual fishing tackling and apparel.

5th. Vessels dispatched in ballast, under permission from the president of the *United States*, to import, from abroad, property from any citizen, which was actually without the jurisdiction of the *United States*, prior to the 22d *December*, 1807.

The remaining provisions, in the several acts, are merely auxiliary, and appear intended more effectually to ensure the execution of the primary prohibitions.

The first act is without limitation, and the several supplementary acts are to exist, during the continuance of the first.

A separate act, passed *April* 22d, 1808, authorises the president of the *United States* to suspend the operation of the act laying an embargo, and the several supplementary acts, "in the event of such peace, or suspension of hostilities, between the belligerent powers of Europe, or of any changes in their measures, affecting neutral commerce, as may render that of the *United States* safe, in the judgment of the president"—with a *proviso*, that such suspension shall

not extend beyond twenty days, after the next meeting of congress.

My views of the constitutional question, which has been raised in this case, will be confined to the acts relative to navigation, and to exportation by sea. On those, only, do the cases before the court depend; and it is obviously incumbent on a judge to confine himself to the actual case, presented for trial, and its inseparable incidents, and to avoid pronouncing premature decisions on extraneous questions.

The prohibition of exportation by *land*, can, properly, come into view, only as it may tend to explain those provisions, on which I am called to decide, and to indicate their character.

In the whole course of the interesting argument on this great question, and in all my reflections upon the subject, I have been deeply sensible of the solemn weight and magnitude of the inquiry. The unusual press of business, at this term, and the application of the recent acts to the numerous cases presented for trial, must have given full occupation to the mind, if supposed to be solicitous for a correct discharge of duty; and I could have wished, that this paramount question of constitutionality, when gentlemen had determined to rely on it, should have been reserved for the higher tribunals of the nation. But, on this subject, it was not for me to choose. A comparison of the law with the constitution is the right of the citizen. Those who deny this right, and the duty of the court resulting from it, must regard with strange indifference, a precious security to the individual, and have studied, to little profit, the peculiar genius and structure of our limited government.

Objections to an act of congress, on the ground of constitutionality, may be referred to the following heads.

1. A repugnancy to some of the exceptions or restrictions to the legislative authority, expressed in the constitution of the *United States*.

2. A repugnancy to some of the affirmative provisions, in the constitution.

3. A want of conformity to the powers vested in the legislature, by the constitution; or that the act in question is not authorised by any of those powers.

As an instance under the *first* head, we may suppose an act, contravening the restrictive clause in the constitution, "No bill of attainder or *ex post facto* law shall be passed." An act repugnant to the declaration that, "the trial of all crimes, except in cases of impeachment, shall be by jury," would afford an example under the *second* head. Contraventions of this description, when clearly described and determined, could be of no legal effect; and it would appear to be the duty of the national courts, conformably to their specified authority by the constitution, and pursuant to the oath of office, to regard the acts, containing such repugnancies, to be so far void.

It does not appear, nor is it, as I recollect, contended, that the acts under consideration, are liable to objections of this description. They *contravene* none of the *exceptions* or *restrictions*, expressed in the constitution, nor is it made to appear, that they are *repugnant* to any of its *affirmative declarations*. At least, this is true of the *primary provisions*. If any of the *auxiliary regulations*, in the supplementary acts, applying to the coasting trade, are liable to objections of this nature, they will be separately considered. Some of those regulations, it is argued, contravene that restriction on the powers of congress, which provides, that "vessels bound to, or from, one state, shall not be obliged to enter, clear, or pay duties in another." If this objection be available, it equally applies to the regulations in the coasting act, early adopted after the organization of the government; and which have since been in uniform operation, without meeting an objection of this sort. There is a degree of ambiguity in the expression, which seems to countenance the construction suggested in the argument; but the true construction avoids the objection. It was intended, as I understand it, to prevent vessels bound to, or from, a port, in any state, being obliged to enter, clear, or pay duties in any state, other than that, to, or from which, they should be proceed-

ing. One of the amendments, proposed by the state of *North Carolina*, suggests the following substitute for the clause we are now considering. "Nor shall vessels, bound *to a particular state*, be obliged to enter or pay duties *in any other;* nor, when bound *from any one of the states*, be obliged to *clear in another.*" This reading would give a clearer expression of, what must be considered, the true meaning of the clause as it now stands.

The objections, on the ground of unconstitutionality, to the acts in question, are thus limited to the *third* head; a defect of constitutional power, in the congress of the *United States*, to enact them. On this ground has the argument proceeded, and it is contended, that congress have not power or authority, by the constitution of the *United States* thus to interdict commercial intercourse with foreign nations.

On this head, a preliminary inquiry, of material importance, presents. What is the power or authority of the court, relative to an objection of this description? Or, in other words, is a mere exceeding of the powers of congress, in legislation, without a repugnancy to express provisions of the constitution, among the proper objects of cognizance in the federal judiciary?

In the consideration of this preliminary question, I shall first recur to judicial determinations and opinions for light and guidance.

In the year 1792, congress passed an act, relative to the claims of invalids, for pensions, which required the intervention, in a qualified manner, of the Circuit Courts. The judges of three of the Circuit Courts declined the execution of the act, and assigned their reasons, to the President of the *United States*.

The objections were, that the business, assigned to the courts by the act, was not of a judicial nature; and that their judgments, or opinions, (which they considered as judgments) were, by the act, subjected to revision and controul by the legislature, and by an officer of the executive department.

Though they declined acting as *courts* under the act, they expressed a willingness, for the accommodation of applicants, to consider themselves as *commissioners;* but congress, at a subsequent session, repealed the objectionable clauses, and made other provision, for determining the claims of applicants for pensions. 2 *Dallas* 410.

In the case of *Vanhorne's lesse* vs. *Dorrance*, in the Circuit Court of *Pennsylvania*, *April* term 1795, (2 *Dallas* 304,) Judge *Paterson* pronounced an act of *Pennsylvania*, called, the *quieting and confirming act*, to be null and void, as repugnant to the constitution of that state.

In the supreme court of the *United States*, *February* term 1796, in the case of *Hylton*, plaintiff in error, vs. *the United States*, the constitutionality of the act, "laying duties on carriages," was discussed and determined.

The point, in controversy, depended on the meaning of the terms *direct tax*, in the constitution.

It was contended, by the counsel for the plaintiff in error, that the tax on carriages was a *direct tax*, and, not being laid according to the *census*, as direct taxes are, by the constitution, required to be laid, that the law was void.

The court were, unanimously, of opinion, that the tax on carriages was not a *direct tax;* of course, the question of the validity of an act, repugnant to an express clause in the constitution, was not determined. Judge *Paterson*, however, gave his opinion, on this point. "If it be a *direct tax*, it is unconstitutional; because it has been laid pursuant to the rule of *uniformity*, and not to the rule of *apportionment*."

Judge *Chase* observed, "as I do not think the tax on carriages is a *direct tax*, it is unnecessary, at this time, for me to determine, whether the court constitutionally possesses the power to declare an act of congress void, on the ground of its being made contrary to, or in violation of the constitution; but if the court have such power, I am free to declare, that I will never exercise it but in a *very clear case*."

Justices *Iredell*, *Wilson* and *Cushing* all concurred with their associates, that the tax on carriages was not a *direct tax*, but gave no intimation of their opinions, if it had been of that denomination. 3 *Dallas*, 171.

In the same Court, August Term, 1798, in the action *Calder* and wife vs. *Bull* and wife, (3 *Dallas* 386,) the question was, as to the validity of an act of the legislature of Connecticut, setting aside a decree of a court of probate, and granting a new hearing. It was contended, that it was an *ex post facto* law, and, as such, prohibited by the constitution of the United States.

The court were of opinion, that the law in question was not an *ex post facto* law, and, of course, there was no contravention of the constitution.

Judge *Chase* avoided giving an opinion, whether the Court had jurisdiction to decide, that any law made by Congress, contrary to the Constitution of the United States, be void.

Judge *Iredell* was more explicit. "It has been the policy" said he "of all the *American* states, which have individually framed their state constitutions, since the revolution, and of the people of the *United States*, when they framed the Federal Constitution, to define, with precision, the objects of the legislative power, and to restrain its exercise, within marked and settled boundaries. If any act of congress, or of the legislature of a state, *violates those constitutional provisions*, it is unquestionably void; though, I admit, that, as the authority to declare it void, is of a delicate and awful nature, the court will never resort to that authority, but in a clear and urgent case."

The last case, which I shall cite, is *Calender's* trial, in the Circuit Court in *Virginia*, *May* term 1800, on the additional act "for the punishment of certain crimes against the *United States*," commonly called the *sedition law*.

The counsel for the traverser offered to argue to the jury, that the law was unconstitutional. In overruling this motion, and in assigning his reasons, Judge *Chase* made the following observations, which appear to be pertinent to the present inquiry.

"No citizen of knowledge and information, unless under the influence of passion or prejudice, will believe, without very strong and indubitable proof, that congress will, *intentionally*, make any known violation of the federal constitution and their sacred trust. I admit, that the constitution contemplates that congress may, from inattention, or error in judgment, pass a law *prohibited* by the constitution, and, therefore, it has provided a peaceable, safe and adequate remedy. If such a case should happen, the mode of redress is pointed out in the constitution, and no other mode can be adopted, without a manifest infraction of it. Every man must admit, that the power of deciding the constitutionality of any law of the *United States*, (or of any particular state) is one of the greatest and most important powers the people could grant. Such power is restrictive of the legislative power of the Union, and also of the several states, not absolute and unlimited, but confined to such cases only, where the law in question shall clearly appear to have been *prohibited* by the federal constitution, and not in any doubtful case."

The immediate question that the learned judge was then considering, was, whether the power of determining the constitutionality of the law belonged, exclusively, to the *court*, or whether it could be rightfully exercised by a *jury*. His remaining observations, appearing in the published account of the trial, more especially apply to that question.

None of these cases decide the point now under consideration. By one of them, we have a decision against a *state* law, produced as a ground of title, as being *repugnant* to the constitution of the state. In another, we have the opinion of Judge *Paterson*, that a law of the *United States*, would, upon a certain construction, be repugnant to the constitution, and void. In the *Connecticut* case, we have Judge *Iredell's*, opinion, that an act of congress, or of the legislature of any state, may be declared void by the court, if it *violate constitutional provisions*. Judge *Chase*, in those cases, speaks with great caution, on this head, it not being necessary to de-

cide the point. In *Callender's* trial he is more explicit; and I understand him to admit the power of the court to disregard a statute, *repugnant* to the *restrictions*, in the constitution, on the authority of congress, and on that of the state legislatures. In none of the cases have we a decision, nor an opinion, as to the power of the court, where the objection to a statute is grounded, not on a *repugnancy to express provisions*, but on a supposed undue *extension* of a *given power*.

The first case is of a peculiar nature, and no conclusive inference can be drawn from it, of the opinion of the court, relative to the point now under consideration. The law was not declared void, but the court declined acting upon it, except in a qualified manner, as commissioners. Their views and determinations on the subject, have reference to the nature of the judicial authority, and to the preservation of their constitutional independency, against encroachment.*

* Since this opinion was pronounced, it has been perceived, that two other cases should have been noticed, both of them in affirmance of the general doctrine, exhibited in the cases cited in the text.

Cooper vs. *Telfair*, 4 *Dallas* 14. This case was in the Supreme Court of the *United States*, *February* term 1800, in error, from the Circuit Court for the district of *Georgia*. An act of attainder and confiscation of the state of *Georgia*, passed *May* 1782, was pleaded in bar of the plaintiff's demand. In the replication, were set forth several articles of the constitution of that state, one of which requires, that "all matters of breach of the peace, felony, murder and treason against the state" shall be *tried* in *the county* where the crime may have been committed. The other articles, specified in the replication, relate to the separation of the legislative, executive and judiciary departments—the principles of the *habeas corpus* act—freedom of the press—trial by jury—and the confinement of the legislature, in making laws, to such, as should not be repugnant to the true intent and meaning of any rule or regulation, contained in the constitution. It was contended, that the act of attainder and confiscation was repugnant to the constitution of *Georgia*, and void. The court were unanimously of opinion, that the act was not repugnant to the constitution, and affirmed the judgment of the Circuit Court, which was for the defendant, who was sued on the confiscated demand.

Washington, *Justice*, observed. "The constitution of *Georgia*, does not expressly interdict the passing of an act of attainder

Finding no direct judicial authortiy on the point, I shall next adduce opinions and reasonings from a less authoritative source, but still highly respectable.

It is observed, by an eminent juridical writer, that "the scrupulous dignity of the law of England has not been accustomed to receive as authorities, any thing less than the opinions delivered by judges on the bench." [*Reeves' Law of Shipping.*] This is doubtless a discreet and laudable reserve; and, most commonly, a strict adherence to the rule would still leave open to the inquirer, abundant means for a correct and satisfactory conclusion. But, in a case of this description, out of the ordinary range of legal discussion, we are compelled to resort to other sources; and the counsel

and confiscation, by the authority of the legislature"—"If the plaintiff in error had shown that the offence, with which he was charged, had been committed in any *county of Georgia*, he might have raised the question of conflict and collision between the constitution and the law; but, as that fact does not appear, there is no ground, on which I could be prepared to say, that the law is void. The presumption, indeed, must always be in favour of the validity of laws, if the contrary is not clearly demonstrated.

Judge Chase was of the same opinion, and for the same reason. He intimates, at the same time, his opinion of the validity of the law, on other grounds, and expresses a doubt, whether the power of the court, to declare an act void, can be employed to invalidate laws, enacted previous to the existence of the constitution of the *United States.*

Judges Paterson and Cushing considered the act within the power of the legislature, there being no express provision in the constitution, devesting or transferring it; and the offender being beyond the reach of judicial process, when the law was enacted. "The constitutions of several of the other states," said judge *Paterson*, "contain the same general principles and restrictions; but it was never imagined that they applied to a case like the present; and, to authorize this court to pronounce any law void, *it must be a clear and unequivocal breach of the constitution, not a doubtful and argumentative implication.*"

In *Marbury* vs. *Madison*, in the same court, *February* 1803, the act of congress, authorising the Supreme Court to issue *writs of mandamus*, was considered as void, so far as it was repugnant to the specification of cases in the constitution, to which the *original jurisdiction* of that court is limited. The illustrative cases, supposed by the court, in their opinion, as pronounced by Chief Justice *Marshal*, are of similar description. 1. *Cranch* 137.

on both sides have found it necessary, or convenient, to derive confirmation or illustration of their positions, from books and treatises, seldom seen or mentioned at the bar.

The work to which I shall refer, is that admirable commentary on the constitution of the United States, intitled, "*The Federalist*," the author of which is pronounced by one of our learned Judges, to be superior to *Blackstone*, or his successor *Woodeson*, for extensive and accurate knowledge of the true principles of government.* If we love and cherish that constitution, we shall highly esteem this excellent commentary on that precious instrument. If that great political temple command our admiration, we shall follow, with improvement and delight, this luminous guide, through all its fair apartments.

In the eighty third number, after observing, that the power of congress extends only to certain enumerated cases, and, that this specification excludes all pretensions to general legislative power, or authority, the writer proceeds; "In like manner, the judicial authority of the federal judicatures is declared, by the constitution, to comprehend *cases particularly specified.* The expression of those cases marks the precise limits, beyond which the Federal Courts cannot extend their jurisdiction; because, the objects of their cognizance being enumerated, the specification would be nugatory, if it did not exclude all ideas of more extensive authority."

In the seventy-eighth number, we have a more distinct exhibition of the author's views of a limited government, and of the power and office of the judiciary branch to secure it. "By a limited government, I understand one, which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice, no other way than through the medium of the courts of justice, whose duty it

* Judge *Chase*—3 *Dall.* 391. "The *Federalist*" has frequently, in other instances, been quoted with respect, in the courts of the *United States*.

must be, to declare all acts, contrary to the manifest tenour of the constitution, void. Without this, all the reservation of particular rights or privileges would amount to nothing."

We then have an interesting discussion on the necessity and foundation of this portion of judicial authority; it is illustrated by the usual exercise of judicial discretion, in discriminating between two contradictory laws, and a pertinent distinction is suggested, applicable to a supposed contravention of a constitutional provision. "Between the interfering acts of an *equal* authority, that, which was the last indication of its will, should have the preference. But, in regard to the *interfering* acts of a *superior* and *subordinate* authority, of an *original* and *derivative* power, the nature and reason of the thing indicate the *converse* of that rule, as proper to be followed. They teach us, that the prior act of a superior ought to be preferred to the subsequent act of an inferior and subordinate authority; and, that, accordingly, whenever a particular statute *contravenes* the constitution, it will be the duty of the judicial tribunals to adhere to the latter, and disregard the former. It can be of no weight to say, that the courts, on the pretence of a *repugnancy*, may substitute their own pleasure, to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen, in every adjudication upon a single statute."

In the eighty-first number, when replying to arguments, or suggestions, against the judiciary, from their supposed power of construing the laws according to the *spirit* of the constitution, it is said; "this, upon examination, will be found to be altogether made up of false reasoning, from misconceived fact. In the first place, there is not a syllable in the plan, under consideration, which *directly* empowers the national courts, to construe the laws according to the *spirit* of the constitution, or, which gives them any greater latitude in this respect, than may be claimed by the courts of every state. I admit, however, that the constitution ought to be the standard of construction for the laws; and that, when-

ever there is an *evident opposition*, the laws ought to give place to the constitution."

In the eightieth number, which exhibits a view of the judicial department, in relation to the extent of its powers, the general position is, that "there ought always to be a constitutional method of giving efficacy to *constitutional provisions*." Having laid down the principles, proper for the regulation of the federal judiciary, the writer proceeds to test, by those principles, the particular powers given to the judiciary, by the constitution. He then recites the first paragraph of the second section, of the third article, as constituting the entire mass of the judicial authority of the Union. Viewing it then, in detail, he proceeds to comment on the first part of the paragraph—"*The judicial power shall extend to all cases in law and equity arising, under this constitution* [*and*] *the laws of the United States*." "It has been asked," he observes, "what is meant by *cases arising under the constitution*, in contradistinction from those *arising under the laws of the United States?*" "The difference," he adds, "has been already explained. All the restrictions upon the authority of state legislatures furnish examples. They are not, for instance, to emit paper money; but the interdiction results from the constitution, and will have no connexion with any law of the United States. Should paper money, notwithstanding, be emitted, the controversies concerning it would be cases arising under the constitution, and not upon the laws of the *United States*, in the ordinary signification of the terms. This may serve as a sample of the whole."

These extracts give a clear and satisfactory view of the opinions entertained by the writer, or writers, of those papers, on this topic; and it is evident, that the judicial authority, is, in their estimation, precisely limited, in regard to deciding on the validity of legislative acts; and that the power to declare them void exists, only, in cases of *contravention*, *opposition* or *repugnancy*, to some express restrictions or provisions contained in the constitution. The examples and the argument apply only to cases of legislative

action, which their powers *forbid;* not to those, which their powers may be supposed *not to authorize.* This is further manifest from observations, variously interspersed, in those writings, relative to a supposed abuse or exceeding of powers, by the legislature; or, in other words, to an act of usurpation. In the first place, there is a strong conviction expressed, that no such case can or will occur, in a government so organized, and where such strong sympathies will exist, between the representatives and their constituents. That the government is in the hands of the representatives of the people, is pronounced to be, "the essential and only efficacious security for the rights and privileges of the people, which is attainable in civil society." But, should usurpation rear its head; should the unnatural case ever occur, when the representatives of the people should betray their constituents, we are referred, for consolation and remedy, to the power and vigilance of the state governments; to publick opinion; to the active agency of the people in their elections; to that perpetual dependence on the people, which is the primary controul on the government; "to the vigilant and manly spirit, which actuates the people of *America*, a spirit which nourishes freedom, and, in return, is nourished by it;" and, in case of desperate extremities, for which no system of government can provide, "to that original right of self-defence, which is paramount to all positive forms of government."

In one passage, indeed, where the writer is speaking of the resort, in case of a supposed usurpation, we are referred to the judiciary and to the executive, as well as to the people, without any discrimination of the circumstances to which the different sources of remedy would be applicable. "In the first instance," says the writer, "the success of the usurpation will depend on the executive and judiciary departments, which are to expound and to give effect to the legislative acts; and, in the last resort, a remedy must be ob-

tained from the people, who can, by the election of more faithful representatives, annul the acts of the usurpers."*

This passage may be so construed, as to be consistent with those before cited; but, if irreconcileable, with the doctrines so clearly expressed in other places, we must account for any supposed diversity of sentiment, from the circumstance, that those valuable papers were not all from the same pen.

Cases might be put, of acts, so manifestly without the sphere of objects, committed to the national government, that the judiciary branch might be competent to pronounce them invalid, not as repugnant to any particular clause of the constitution, but to its whole expressed design and tenour. "The propriety of a law," says the writer, "so frequently quoted, must always be determined by the nature of the powers upon which it is founded. Suppose, by some forced construction of its authority (which indeed cannot be easily imagined) the federal legislature should attempt to vary the *law of descent* in any state; would it not be evident, that, in making such an attempt, it had exceeded its jurisdiction, and infringed upon that of the state?" Here would be an obvious assumption of a *new power*, not to be found in the constitution, and it is distinguishable from an improper exercise, or undue extension, of a *power given*. "The national government, like every other," adds the writer, must judge in the first instance, of the proper exercise of its powers, and its constituents, in the last. If the federal government should overpass the just bound of its authority, and make a tyrannical use of its powers, the people, whose creature it is, must appeal to the standard they have formed, and take such measures, to redress the injury done to the constitution, as the exigency may suggest, and prudence justify."†

It is a recommendation of these views of the constitutional powers of the judiciary, relative to legislative acts, that they reduce it to that precision and certainty, which is so desirable, in reference to judicial deliberations; and avoid those

* No. 44. Vol. II. p. 74.
† No. 33. Vol. I. p. 203.

manifest grounds or occasions of irreconcileable collision, between the judiciary and legislative departments, which might otherwise prevail. Affirmative provisions and express restrictions, contained in the constitution, are sufficiently definite to render decisions, probably in all cases, satisfactory; and the interferences of the judiciary with the legislature, to use the language of the constitution, would be reduced to "*cases*," easily to be understood, and, in which the superior, commanding, will of the people, who established the instrument, would be clearly and peremptorily expressed. To extend this censorial power further, and especially to extend it to the degree, contended for in the objections to the act now under consideration, would be found extremely difficult, if not impracticable, in execution. To determine where the legitimate exercise of discretion ends, and usurpation begins, would be a task most delicate and arduous. It would, in many instances, be extremely difficult to settle it, even in a single body. It would be much more so, if to be adjusted by two independent bodies, especially if those bodies, from the nature of their constitution, must proceed by different rules.

Before a court can determine, whether a given act of congress, *bearing relation to a power with which it is vested*, be a legitimate exercise of that power, or transcend it, the degree of legislative discretion, admissible in the case, must first be determined. Legal discretion is limited. It is thus defined by lord *Coke*, *Discretio est discernere, per legem, quid sit justum.* Political discretion has a far wider range. It embraces, combines and considers, all circumstances, events and projects, foreign or domestick, that can affect the national interests. Legal discretion has not the means of ascertaining the grounds, on which political discretion may have proceeded. It seems admitted, that *necessity* might justify the acts in question. But how shall legal discussion determine, that political discretion, surveying the vast concerns committed to its trust, and the movements of conflicting Nations, has not

perceived such necessity to exist? Considerations of this nature have induced a doubt of the competency, or constitutional authority of the court, to decide an act invalid, in a case of this description. On the precise extent, however, of the power of the court, I do not give a definite opinion; my view of the *main question*, submitted by the counsel, in this case, rendered such a decision unnecessary. I now proceed to the examination of that question. It will be perceived, that some of the considerations, suggested under the last head, have an application to the remaining inquiry, and, it is acknowledged, that they had an influence in forming my determination.

It is contended, that Congress is not invested with powers, by the Constitution, to enact laws, so general and so unlimitted, relative to commercial intercourse with foreign nations, as those now under consideration.

It is well understood, that the depressed state of American commerce, and complete experience of the inefficacy of State regulations, to apply a remedy, were among the great, procuring causes of the federal Constitution. It was manifest, that other objects, of equal importance, were exclusively proper for national jurisdiction; and that under national management and controul, alone, could they be advantageously and efficaciously conducted. The Constitution specifies those objects. A national sovereignty is created. Not an unlimited sovereignty, but a sovereignty, as to the objects surrendered and specified, limited only by the qualifications and restrictions, expressed in the Constitution. Commerce is one of those objects. The care, protection, management and controul, of this great national concern, is, in my opinion, vested by the Constitution, in the Congress of the United States; and their power is sovereign, relative to commercial intercourse, qualified by the limitations and restrictions, expressed in that instrument, and by the treaty making power of the president and senate.

"Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the

Indian tribes." Such is the declaration in the constitution. Stress has been laid, in the argument, on the word *regulate*, as implying, in itself, a limitation. Power to *regulate*, it is said, cannot be understood to give a power to *annihilate*. To this it may be replied, that the acts under consideration, though of very ample extent, do not operate as a prohibition of *all* foreign commerce. It will be admitted that partial prohibitions are authorized by the expression; and how shall the degree, or extent, of the prohibition be adjusted, but by the discretion of the national government, to whom the subject appears to be committed? Besides, if we insist on the exact and critical meaning of the word *regulate*, we must, to be consistent, be equally critical with the substantial term, *commerce*. The term does not necessarily include *shipping or navigation;* much less does it include the *fisheries*. Yet it never has been contended, that they are not the proper objects of national regulation; and several acts of congress have been made respecting them. It may be replied, that these are incidents to commerce, and intimately connected with it; and that congress, in legislating respecting them, act under the authority, given them by the constitution, to make all laws *necessary* and *proper*, for carrying into execution the enumerated powers. Let this be admitted; and are they not at liberty, also, to consider the present prohibitory system, as *necessary* and *proper* to an eventual beneficial regulation? I say nothing of the *policy* of the expedient. It is not within my province. But, on the abstract question of constitutional power, I see nothing to prohibit or restrain the measure.

Further; the power to regulate commerce is not to be confined to the adoption of measures, exclusively beneficial to commerce itself, or tending to its advancement; but, in our national system, as in all modern sovereignties, it is also to be considered as an instrument for other purposes of general policy and interest. The mode of its management is a consideration of great delicacy and importance; but, the national right, or power, under the constitution, to adapt regula-

tions of commerce to other purposes, than the mere advancement of commerce, appears to me unquestionable.

Great Britain is styled, eminently, a commercial nation; but commerce is, in fact, a subordinate branch of her national policy, compared with other objects. In ancient times, indeed, *shipping* and *navigation* were made subordinate to *commerce*, as then contemplated. The mart, or staple, of their principal productions, *wool*, *leather* and *lead*, was confined to certain great towns in the island, where foreigners might resort to purchase; and Englishmen were restrained from exporting those commodities, under heavy penalties. It was conceived, that trade thus conducted, would be more advantageous to the country, than if transacted by the English, on the continent. On this idea was made the statute of the staple; 27 *Edw.* 3. [vid. *Reeves'* Hist. of *English* Law, 2. 393.] This may appear a strange regulation. It was evidently founded on erroneous views, and *Selden*, the learned commentator on *Fortescue*, remarks, "that all acts or attempts, which have been derogatory to trade, have ever been noted to be discouraged and short lived," in that nation. It is well known, how the views of their statesmen, and their commercial laws have changed, since that statute was enacted. The *navigation system* has long stood prominent. The interests of commerce are often made subservient to those of shipping and navigation. Maritime and naval strength is the great object of national solicitude; the grand an ultimate objects are the defence and security of the country.

The situation of the *United States*, in ordinary times, might render legislative interferences, relative to commerce, less necessary; but the capacity and power of managing and directing it, for the advancement of great national purposes, seems an important ingredient of sovereignty.

It was perceived, that, under the power of regulating commerce, congress would be authorized to abridge it, in favour of the great principles of humanity and justice. Hence the introduction of a clause, in the constitution, so framed, as to interdict a prohibition of the slave trade, until 1808. *Mas-*

sachusetts and *New York* proposed a stipulation, that should prevent the erection of commercial companies, with exclusive advantages. *Virginia* and *North Carolina* suggested an amendment, that "no navigation law, or law regulating commerce, should be passed, without the consent of two thirds of the members present, in both houses." These proposed amendments were not adopted, but they manifest the public conceptions, at the time, of the extent of the powers of congress, relative to commerce.

It has been said, in the argument, that the large commercial states, such as *New York* and *Massachusetts*, would never have consented to the grant of power, relative to commerce, if supposed capable of the extent now claimed. On this point, it is believed, there was no misunderstanding. The necessity of a competent national government was manifest. Its essential characteristics were considered and well understood; and all intelligent men perceived, that a power to advance and protect the national interests, necessarily involved a power, that might be abused. The *Federalist*, which was particularly addressed to the people of the state of *New York*, frankly avows the genuine operation of the powers, proposed to be vested in the general government.

"If the circumstances of our country are such, as to demand a compound, instead of a simple, a confederate, instead of a sole, government, the essential point, which will remain to be adjusted, will be to discriminate the *objects*, as far as it can be done, which shall appertain to the different provinces, or departments, of power; allowing to each the most ample authority for fulfilling *those*, which may be committed to its charge. Shall the union be constituted the guardian of the common safety? Are *fleets*, and *armies*, and *revenues* necessary for this purpose? The government of the union must be empowered, to *pass all laws, and to make all regulations which have relation to them.* The same must be the case, in respect to *commerce*, and to every other matter, to which its jurisdiction is permitted to extend."*

* No. 23. Vol. I. p. 146.

If it be admitted that national regulations relative to commerce, may apply it as an instrument, and are not necessarily confined to its direct aid and advancement, the sphere of legislative discretion is, of course, more widely extended; and, in time of war, or of great impending peril, it must take a still more expanded range.

Congress has power to *declare war*. It, of course, has power to prepare for war; and the *time*, the *manner*, and the *measure*, in the application of constitutional means, seem to be left to its wisdom and discretion. Foreign intercourse becomes, in such times, a subject of peculiar interest, and its regulation forms an obvious and essential branch of the federal administration. In the year 1798, when aggressions from *France* became insupportable, a non-intercourse law, relative to that nation and her dependencies, was enacted; partial hostilities, for a time, prevailed; but no war was declared. I have never understood, that the power of congress to adopt that course of proceeding was questioned.

It seems to have been admitted, in the argument, that *state necessity* might justify a limited *embargo*, or suspension of all foreign commerce; but if congress have the power, for purposes of *safety*, of *preparation*, or *counteraction*, to suspend commercial intercourse with foreign nations, where do we find them limited as to the *duration*, more than as to the *manner* and *extent* of the measure? Must we understand the nation as saying to their government—"We look to you for protection and security, against all foreign aggressions. For this purpose, we give you the controul of commerce; but, you shall always limit the time, during which this instrument is to be used. This shield of defence you may, on emergent occasions, employ; but you shall always announce to us and to the world, the moment when it shall drop from your hands."

It is apparent, that cases may occur, in which the indefinite character of a law, as to its termination, may be essential to its efficacious operation.

In this connexion, I would notice the internal indications, exhibited by the acts themselves, relative to their duration.

In addition to the authority given to the President to suspend the acts, upon the contingency of certain events, we have evidence, from the very nature of their provisions, that they cannot be designed to be perpetual. An entire prohibition of *exportation*, unaccompanied with any restriction on *importations*, could never be intended for a *permanent system*; though the laws, in a technical view, may be denominated *perpetual*, containing no specification of the time when they shall expire.

In illustration of their argument, gentlemen have supposed a strong case; a prohibition of the future cultivation of *corn*, in the United States. It would not be admitted, I presume, that an act, so extravagant, would be constitutional, though *not perpetual*, but confined to a *single season*. And why? Because it would be, most manifestly, without the limits of the federal jurisdiction, and relative to an object, or concern, not committed to its management. If an embargo, or suspension of commerce, of any description, be within the powers of congress, the terms and modifications of the measure must also be within their discretion. If the measure be referred to *State necessity*, the body that is authorized to determine on the existence of such necessity, must, also, be competent so to modify the means, as to adapt them to the exigency.

It is said, that such a law is in contravention of unalienable rights; and we have had quotations from elementary writers, and from the bills of rights of the State Constitutions, in support of this position. The doctrines and declarations of those respectable writers, and in those venerable instruments, are not to be slighted; but we are to leave the wide field of general reasonings and abstract principles, and are to consider the construction and operation of an *express compact*, a government of *convention*.

The general position is incontestible, that all that is not surrendered by the Constitution, is retained. The amendment which expresses this, is for greater security; but such

would have been the true construction, without the amendment. Still, it remains to be determined, and it is often a question of some difficulty, what is *given ?* By the second article of the confederation, congress were prohibited the exercise of any power not *expressly* delegated. A similar qualification was suggested, in one of the amendments proposed by the State of New-Hampshire, to the new Constitution. The phraseology, indeed, was strengthened ; and congress were to be prohibited from the exercise of powers, not *expressly* and *particularly* delegated.

Such expressions were not adopted. If they had been, as an intelligent writer justly observes, " Congress would be continually exposed, as their predecessors, under the confederation, were, to the alternative of construing the term, *expressly*, with so much rigour, as to disarm the government of all real authority whatever; or, with so much latitude, as to destroy, altogether the force of the restriction."

It is wisely left as it is ; and the true sense and meaning of the instrument is to be determined by just construction, guided and governed by good sense and honest intentions.

Under the confederation, Congress could have no agency relative to foreign commerce, but through the medium of treaties ; and, by the ninth article, it was stipulated, that no treaty of commerce should be made, whereby the legislative power of the respective States, should be restrained, from imposing such imposts and duties on foreigners, as their own people were subjected to, "*or from prohibiting the exportation of any species of goods or commodities whatsoever.*"

Here we find an express reservation to the State legislatures of the power to pass prohibitory commercial laws, and, as respects *exportations*, without any limitations. Some of them exercised this power. In Massachusetts, it was carried to considerable extent, with marked determination, but to no sensible good effect. One of the prohibitory acts of that State, passed in 1786, was for the express " encouragement of the agriculture and manufactures in our own country."

The other, which was a counteracting law, had no definite limitation, but was to continue in force, until Congress should be vested with competent powers, and should have passed an ordinance for the regulation of the commerce of the States. Unless Congress, by the Constitution, possess the power in question, it still exists in the State legislatures —but this has never been claimed or pretended, since the adoption of the federal Constitution; and the exercise of such a power by the States, would be manifestly inconsistent with the power, vested by the people in Congress, "to regulate commerce." Hence I infer, that the power, reserved to the States by the articles of confederation, is surrendered to Congress, by the Constitution; unless we suppose, that, by some strange process, it has been merged or extinguished, and now exists no where.

The propriety of this power, on the present construction, may be further evinced, by contemplating the operation of specific limitations or restrictions, which it might be proposed to apply. Will it be said, that the amendment, proposed by Virginia and North-Carolina, would be an improvement in the instrument of government? Such a provision might prevent the adoption of exceptionable regulations; but, it would be equally operative in defeating those that would be salutary; and would disable the majority of the nation from deciding on the best means of advancing its prosperity. To avoid such a system, as is now in operation, shall the people expressly provide, as a limitation to the power of regulating commerce, that it shall not extend to a total prohibition; or but for a limited time? Nothing would be gained by such restrictions. A prohibition might still be so nearly total, or extend to such a length of time, without violation of the restriction, as to be equivalent, in practical effect, to the present arrangement. Or will it be said, that the judiciary should then be called upon to decide the law void, though not repugnant to the terms of the restriction, and to consider exceptions from the prohibition, as, in the common case of a fraudulent deed, to be merely *colourable?* Loose

and general restrictions would be ineffective, or, at best, merely directory. If particular and precise, they would evince an indiscreet attempt to anticipate the immense extent and variety of national exigencies, and would not be suitable appendages to a power, which, in its exercise, must depend on contingencies, and, from its nature and object, must be general. A particular mischief or inconvenience, contemplated in framing such limitations, might be avoided; but they would also injuriously fetter the national councils, and prevent the application of adequate provisions for the publick safety and happiness, according to the ever varying emergencies of national affairs. Let us not insist on a security, which the nature of human concerns will not permit. More effectual guards against abuse, more complete security for civil and political liberty, and for private right, are not, perhaps, afforded to any nation than to the people of the *United States*. These views of the national powers are not new. I have only given a more distinct exhibition of habitual impressions, coeval, in my mind, with the constitution. Upon these considerations, I am bound to overrule the objections to the acts in question, which I shall proceed to apply to the cases before the court, believing them to be constitutional laws.

I lament the privations, the interruption of profitable pursuits and manly enterprize, to which it has been thought necessary to subject the citizens of this great community. I respect the merchant and his employment. The disconcerted mariner demands our sympathy. The sound of the axe, and of the hammer, would be grateful music. *Ocean*, in itself a dreary waste, by the swelling sail and floating streamer, becomes an exhilirating object; and it is painful to perceive, by force of any contingencies, the *American* stars and stripes vanishing from the scene. Commerce, indeed, merits all the eulogy, which we have heard so eloquently pronounced, at the bar. It is the welcome attendant of civilized man, in all his various stations. It is the nurse of arts; the genial friend of liberty, justice and order; the sure source of na-

tional wealth and greatness; the promoter of moral and intellectual improvement; of generons affections and enlarged philanthropy. Connecting seas, flowing rivers, and capacious havens, equally with the fertile bosom of the earth, suggest, to the reflecting mind, the purposes of a beneficent Deity, relative to the destination and employments of man. Let us not entertain the gloomy apprehension, that advantages, so precious, are altogether abandoned; that pursuits, so interesting and beneficial, are not to be resumed. Let us rather cherish a hope, that commercial activity and intercourse, with all their wholesome energies will be revived; and, that our merchants and our mariners will, again, be permitted to pursue their wonted employments, consistently with the NATIONAL SAFETY, HONOUR and INDEPENDENCE!

CASE

LAID BEFORE COUNSEL FOR THEIR

OPINION,

ON THE CLAIM TO THE BATTURE,

Situated in front of the suburb St. Mary, New-Orleans:

WITH THE OPINIONS OF M. DERBIGNY, MESS. DU POUCEAU, INGERSOLL, RAWLE, LEWIS AND TILGHMAN.

THE Superiour Court of the territory of Orleans tried, a few months ago, a cause which, by the magnitude, importance and singularity of the questions which it presented, and still more by the publick interest attached to it, had excited for upwards of three years, the talents of several advocates, the attention of the court, and general curiosity; I mean the suit brought by Mr. *Jean Gravier* against the corporation of *New Orleans*, relative to the possession and enjoyment of the batture situate in front of the suburb *St. Mary* of that city.

When the first colonists from Europe arrived on the banks of the Mississippi, they had in a manner to conquer the solid earth from the inundations of that river; it was necessary to restrain the waters by dykes or levees sufficient to protect the land against the rage of inundations, especially at the time of periodical swells. Thence the origin of what is called battures in this territory, which are only certain portions of the bed of the river which the *Mississippi* leaves dry when its waters are low, and covers wholly or in a great measure, in its annual swells.

There has existed from time immemorial, a considerable batture in front of the suburb *St. Mary* of *New Orleans*. That batture begins at the entrance of the suburb on the side

of the city, and runs widening as far as the plantation which formerly belonged to Madame *Delor*.

That batture seems to have been fortunately placed there to favour the building of the city which has risen near it; it may even be said that *New Orleans* would perhaps never have existed, or that it would have been built but very slowly, but for the aid of that natural depositum of materials placed as it were at its door. In a country like lower *Louisiana*, where neither mountains nor hills are to be seen; where not a single stone exists that is not brought thither; where to dig the soil is to incur the danger not only of impairing the land, but of creating infectious and pestilential quagmires, it is easy to conceive how valuable must be a mass of sand and mud incessantly renewed by the bounty of the river, for the building of a large and commercial town, and to repair the losses of the soil which is perpetually falling away, owing to its natural slope, and its situation below the level of the river. Thus it may be said with truth that the whole town of *New Orleans*, with its levees and streets, has been built and always kept in repair by means of the earth drawn from the batture of the suburb *St. Mary*, and that it is almost impossible to find earth elsewhere in sufficient quantity for those purposes, that batture being the only one in proximity to the town.

It is a fact of publick notoriety, that before the claim of *Jean Gravier* was set up (and that claim was laid for the first time in 1804) the inhabitants of *New Orleans* had always enjoyed the liberty of gratuitously taking from the batture of the suburb *St. Mary*, all the earth they had need of for their buildings; that the Spanish government and the cabildo had also ever used this right, taking there earth for the publick uses, such as raising the streets and repairing the levees of the city. It was further proved on the trial, that the *Spanish* government and the *French* government that had preceded, had always evinced a settled determination to preserve to the inhabitants of *New Orleans* the free use of the batture, so useful and indispensible to them, not only for

getting earth there, but to supply various other necessities not less urgent. In fact the batture of the suburb *St. Mary* always served as a place where to lay up wood for fuel and the timber necessary for the consumption of a large city; nor does there exist at *New Orleans*, any other convenient place where to store those materials.

It would moreover have been to devote the population of this city to ravaging epidemics, to permit any individual to appropriate to himself, the soil of the batture of the suburb *St. Mary*, to the prejudice of the publick, for besides the disadvantages that would thence result to the navigation of the river and to commerce in general, the least building or work raised on that batture, would, by the accumulation of slime and filth conglomerated there during the freshes, have, every summer formed a focus of pestilential disease. Accordingly, the *Spanish* government and the cabildo, constantly opposed the forming of any establishment on the batture, and they at different times, caused to be demolished the houses and other buildings, which divers persons had ventured to erect there, at different periods.

Such was the situation of affairs when *Louisiana* was ceded to the *United States* of *America*. The prodigious increase of the commerce of *New Orleans*, resulting from this change of dominion, rendered it still more necessary to leave the batture free to the publick, as it had till then been; for the levee bounding that batture is the place where the numerous boats, called *flats*, which annually arrive at *New Orleans*, laden with flour and provisions of all kinds, come to land and discharge their cargoes.

But this very consideration exciting the cupidity of Mr. *Jean Gravier*, the former proprietor of the plantation on which the suburb *St. Mary* had been formed, suggested to him the idea of raising a claim, which he had never thought of before, and prompted him to maintain that batture, being real alluvions, that of the suburb *St. Mary* belonged to him, as he had been the proprietor of the land which immediately bounds it.

The inhabitants of *New Orleans*, who had, from time immemorial, enjoyed that batture, could not oppose to *Jean Gravier* a positive title of grant in their favour; but they opposed to him their long enjoyment, which was to supply the want of a grant, by the effect of prescription; they opposed to him the acts of the *Spanish* government, which had constantly maintained them in that enjoyment; they finally opposed to him his own acts and those of *Bertrand Gravier* from whom he derived his title, which acts seemed to amount to an acknowledgement of their right.

But the Superiour Court did not think proper to yield to these reasons; it declared the corporation of *New Orleans*, destitute of any title against *Jean Gravier*, *and has maintained the latter in the possession and enjoyment of the batture.* This judgment is doubtless to be respected, because it was rendered by a court that judges in the last resort. To its execution, however distressing it be to the publick, not the smallest opposition has ever been made, for *Jean Gravier* has been peacefully put into possession by the sheriff. It is true that the incalculable advantages of the batture having been more sensibly felt, since the publick has been deprived of them, the publick mind has been heated to such a temper as to hinder, for some days, the workmen of *Jean Gravier* from working at a trench which he or Mr. *Livingston*, jointly interested, wished to cut on the batture, to drain off the water.

But happily this transient ferment was not followed with any reprehensible excess, and the people brought back to reflection, were sensible that submission to the laws, is the first duty of citizens, and that there exists more regular means of obtaining justice, than those which a sudden effervescence had alone made them adopt. And in fact, whatever respect may be due to the decisions of the court, does there exist an absolute interdict against submitting its dispensations, in a particular case, to a superiour authority? Does not the cause of the batture interest not only the inhabitants of *New-Orleans*, but also those of all *Louisiana*, and even

had thirty-two arpents in front, by fifty arpents in depth, as was declared in the process verbal of *Broutin*, by which he was working. *Olivier Devezin*, then divided all the lands of the Jesuits into six lots, to facilitate the sale; and of those lots, that which was nearest the fortifications of the city, and which was marked as having seven arpents in front by fifty in depth, was adjudged to Mr. *Pradel*, a lieutenant of the navy.

It is most important to observe that at the period the sale was made, of the different lots of the Jesuits land, *Louisiana* was under the dominion of *France*. The *French* laws must therefore direct our judgment as to the effect of those sales, and the extent of the right which they could transfer to Pradel and other purchasers of the Jesuit's property.

Another fact not less important, is that, at the period of those sales, and long before, there existed a batture in front of the ground now occupied by the suburb *St. Mary*.*— The question of property in that batture, must therefore be decided by the French laws which were in force at the time of the sale of the plantation lying nearest to it.

Since 1763, it appears that those different lots of the Jesuits' land, passed successively through the hands of various purchasers, until at last about seventeen arpents of that land, on the side of the town, were united in the possession of a single proprietor, the late *Bertrand Gravier*, ancestor of *Jean Gravier*, and founder of the suburb *St. Mary*. How *Bertrand Gravier*, or rather those under whom he claimed, became proprietors of those seventeen arpents of land, is what has never been satisfactorily explained. It was indeed proved that *Bertrand Gravier* was heir to his wife, who had been the relict of one *Renard*: and that the said *Renard* had purchased of Madame *Pradel*. But how had Madame *Pradel* thirteen arpents to sell, when her husband had originally purchased but seven? And even on the supposition that she was the proprietor of the thirteen arpents mentioned in the

* Testimony of Messrs. Livaudais and Durcy.

sale made to *Bertrand*, how did it happen that *Bertrand Gravier* who had inherited no more than the rights of the widow *Renard*, gave to his suburb nearly seventeen arpents in front? Here surely is some chasm in the titles presented by *Jean Gravier*.

Be it as it may, in 1767, *Louisiana* passed from the dominion of *France* to that of *Spain*, and in 1788, *Bertrand Gravier* conceived the idea of establishing a suburb, under the name of *St. Mary*, on that part of the Jesuit's plantation possessed by him. With this view he caused to be drawn a plot of the laying off of the ground, in streets and building lots, by Mr. *Laveau Trudeau*, at that time surveyor-general of *Louisiana*.

In the year 1796, *Bertrand Gravier* enlarged his original design, by adding new streets and a publick square to his suburb. He requested Mr. *Laveau Trudeau* to draw a new plot conformable to his new ideas, and his subsequent sales were all according to the latter plot.

No person acquainted with the principles of monarchichal government, and especially with those of *Spain*, can be persuaded that *Bertrand Gravier* could ever have presumed to establish a suburb, without a superiour approbation, and without submitting himself to certain conditions of general police, common to all *Spanish* cities, both of the old and the new world. What proves that Mr. *Bertrand Gravier* obtained that approbation and submitted himself to those conditions, is that he directed Mr. *Laveau Trudeau* to deposit a duplicate of the plot of 1796, in the archives of government, and that the duplicate was there deposited conformably to his desire. Now, was it merely to ornament the archives of government that Mr. *Bertrand Gravier* there deposited his plot, or was it for the purpose of making that plot serve as a kind of deed or publick instrument that might ascertain the manner in which he had agreed with the government to establish and divide his suburb? On this question, no impartial mind can entertain a doubt.

This point being established, if we examine the copy of the plot of 1796, which is recognised by Mr. *Laveau Trudeau* to be that by him deposited in the archives of the *Spanish* government, we find that the batture is there marked as a space which is to remain free, and not subject to be built on; for it is no way divided into lots, as is the land of the suburb. If then *Bertrand Gravier* ever had any right to the batture, as riparious proprietor, did he not lose it by the tacit contract which he then made with the *Spanish* government, in depositing the plot of his suburb?

That this act of depositing the plot was considered as a relinquishment of his right, is confirmed by the testimony of Mr. *Laveau Trudeau;* by all the subsequent conduct of *Bertrand Gravier*, and finally by the publick acts of the cabildo and of the *Spanish* government.

Mr. *Laveau Trudeau* deposed, that having asked Mr. *Bertrand Gravier* when he was making the plot of 1796, whether he should divide the batture into lots as well as the rest of the ground, the latter replied in the negative, observing that the batture was publick property.

Mr. *Laveau Trudeau* further deposed, that Miss *Trudeau* and Mr. *Poeyfare'*, who had purchased of *Bertrand Gravier* some lots on the front of the suburb, on the side of the river, solicited him to sell them the portion of the batture that lay opposite those lots, and that he refused to sell the same, alleging that he had not a right to dispose of it, though Mr. *Laveau Trudeau* declared himself of the contrary opinion.

Mr. *Livaudais* the father, a respectable inhabitant of this territory, as also Mr. *Rousseau*, deposed that under the government of the Baron de Carondelet, *Bertrand Gravier* had refused to repair the road and the levee in front of the suburb *St. Mary*, under the pretext that he had converted his plantation into a suburb, and sold the front lots, the duty no longer concerned him as the batture was publick property; in consequence of which declaration the government caused the roads to be repaired by the criminals at hard labour.

To these publick acts of *Bertrand Gravier* are opposed solitary deeds of sale, hidden under the dust of a notary's office, whence they would never have been taken but for the present circumstances. But was it not proved on trial, in what manner those deeds of sale had been obtained from *Bertrand Gravier*? Did not witnesses prove, that in selling some portions of that batture to some individuals, *Bertrand Gravier* had only yielded to their solicitations, and had declared that it could avail nothing, and that he had not a right to do what was required of him? But even were it otherwise, what could be inferred from clandestine deeds? Were those deeds ever brought forward during the *Spanish* government? Did the purchasers who might have availed themselves of them ever venture to make the least use of them? So far were they from availing themselves of them, that we shall see that Mr. *Claude François Girod*, one of the purchasers who had required *Bertrand Gravier* to sell them the batture in front of their lots in the suburb *St. Mary*, solicited the cabildo for permission, to erect a corn mill on that portion of the batture which he had thus caused to be sold to him, and that that permission was refused him.

The same judgment may be formed of the evidence of which *Jean Gravier* attempts to avail himself, to prove that the *Spanish* government acknowledged his right to the batture; we mean to speak of the deposition of Mr. *Sigur*, who maintains that Mr. *de Carondelet* sent him one day to Mr. *Bertrand Gravier*, to request of him permission to lay masts belonging to government, on the batture of the suburb!

To such evidence we can oppose, not conversations held by the governors, in private, or in their own houses, but the publick acts of those same governors in their political capacity, with the assistance of the auditor of war, their indispensable counsel, whenever they decided contestable points.

We shall oppose the fact to which Mr. *Pedesclaux* testified, that in 1794, Mr. de Carondelet caused it to be proclaimed by beat of drum, that it was forbidden to erect any buildings

on the batture, and that all then standing thereon were ordered to be taken down.

We shall oppose the verbal decision given by Mr. *Nicolas Vidal*, auditor of war, who being consulted by the *Baron de Carondelet*, who wished to know what he could do for Mr. *Christoval de Armas*, who solicited permission to establish a brick kiln on the batture of the suburb *St. Mary*, answered: "That that permission could not be granted, by reason that all that part of the strand of the river which its waters cover in their greatest swells, is publick property."

These acts of government, in favour of the publick enjoyment of the batture, are confirmed, and in a manner corroborated by the deliberations of the cabildo, at which it is known that the governor always presided.

It is indeed to be regretted that the records of the cabildo were left in the utmost confusion, on the late change of government that took place in *Louisiana*. But for that circumstance we might surely have found among them important documents relative to the batture, and not only amongst those records, but also in the archieves of government, which were carried off to *Pensacola*, without its having ever occurred to any person to search amongst them, for documents that might interest so important a cause, of which it was impossible to foresee the existence.

Yet we read in the register of the cabildo, a declaration dated the 29th of August, 1795, which authorises to be defrayed out of the city funds, the expense of a fence which Mr. *de la Chaise*, the regidor, had caused to be made on the batture of the suburb *St. Mary*, in order to preserve earth there, for the use of the publick in the time of high water. That fence lasted several years, and traces of it were to be seen not long ago.

In fine, in the year 1801, Mr. *Claude François Girod*, who, as has been seen, had secretly bought of *Bertrand Gravier*, that portion of batture which was in front of his property in the suburb, applied to the cabildo, for permission to establish a brick-kiln on that same part of the batture; but the cabil-

do, by its deliberation of the 5th of *June* of the same year thought proper to refuse him that permission.

It is particularly to be observed, that at the time of that deliberation, the president of the cabildo was the same *Niçolas Vidal*, whose knowledge in jurisprudence is so well attested in this territory, and who then discharged the functions of governor *pro tempore*.

During the same deliberation, it was observed that the government had already, by proclamation, forbidden to build on the batture; but that, notwithstanding that prohibition, several persons had there erected buildings. On this it was ordered that those persons should be cited to appear, that whatever claims they might have, might be examined and decided.

Mr. *Caisergues*, who was the procureur-syndic, and was present at that deliberation, asserts that Mr. *Niçolas Vida* delivered, on that occasion, a written opinion, the result of which was, that no person had a right to build on the batture, and that it was publick property.

And accordingly, we read on the register, a memorandum, subjoined to the deliberation, purporting "that orders were subsequently given for the demolition of all buildings which had been erected on the batture," and several witnesses attest that those orders were executed, and that Miss *Trudeau* among others, who had a small house on the batture was obliged to throw it down.

Bertrand Gravier died in 1797, leaving several brothers and sisters his heirs; but as *Jean Gravier*, one of his heirs was the only one present in *Louisiana* at the time of *Bertrand's* death, *Jean* contrived to have all the estate of the succession adjudged to himself, at the rate of the estimate to be made thereof. That estimate was made in the month of *July*, 1797; in it were described and separately appraised, the lots and grounds unsold in the suburb *St. Mary*; no mention was made of the batture, and it would indeed have been very difficult to appraise it, for it was then entirely covered with water. Yet it is by virtue of that sale or adjudication, that

Jean Gravier pretends to be the proprietor of the batture and has succeeded in causing himself to be maintained in it.

In the course of his lawsuit with the city, *Jean Gravier* required Mr. *Mansuy*, the engineer, to ascertain whether his land had the fifty acres in depth which has been seen, are guaranteed by the original sales made to Pradel and others, of the *Jesuit's* land. Mr. *Mansuy* attested that he had found by survey, that the land of *Jean Gravier*, beginning at the angle of the suburb on the city side, had not only fifty acres in depth, but that he measured as far as fifty-six acres, at which spot he found marked trees which he was told was the boundary line of Mr *J. B. Macarty*.

The question now to be resolved is, whether, according to the French laws, which were in force at the time of the sale of the *Jesuit's* property, and which ordain that the soil formed by *alluvions* or *atterissements*, on navigable rivers, belong to the king, if he has not renounced his claim to them by a formal and express grant;

Whether, on full proof of the existence of a space of earth which the king had reserved to himself between the river and the *Jesuit's* plantation, on which reserved space are the royal highway and the levee, the reservation of which space is proved by its not being comprised in the surveys and sales ordered by the king;

Whether the firm resolution which the *Spanish* government always evinced, of keeping the batture, which is behind that levee, for publick uses, by permitting no person to settle on it, and refusing any grant inconsistent with that resolution;

Whether all these considerations do not prove that the sovereign's right to that batture as well as to the adjoining levee and highway, was never alienated and made over to *Jean Gravier* or any other person: and whether the *United States* have not consequently a well founded and clear title to the property, as being part of the publick demesne?

M. DERBIGNY'S OPINION.

.....

Having considered the above statement of the case, together with the documents relative to the *batture* or *alluvion* there referred to, and the testimony heard in the suit between *Jean Gravier* and the corporation of *New Orleans;*

The undersigned counsel is of opinion that the said batture or alluvion, is a property formerly royal, which passed from the crown of *France* to that of *Spain*, and belongs at present to the *United States.*

This opinion is founded on the following reasons:

1st. Alluvions on navigable rivers belonged to the king of *France.*

2ndly. The plantation bordering on the limits of the city of *New Orleans* was sold by the king of *France* in 1763, when the alluvion situate in front of that land was already in being.

3dly. Between the alluvion and the land sold, lay a royal road (the same that still exists) and a levee, both which were then, and have still remained publick property.

4thly. The alluvion in question has never ceased to be a royal property, the enjoyment of which the *French* and *Spanish* governments at all times left to the publick, and on which they constantly hindred private individuals from encroaching.

5thly. Neither *Jean Gravier*, nor those from whom he derives his title, ever were in possession of the alluvion; and *Bertrand Gravier* himself, at the time of his settling a suburb in front of his plantation, declared that he had no claim to the alluvion.

Let us examine each of these points separately, with the attention due to the importance of the subject.

FIRST POINT.

" The alluvions or accretions on navigable rivers, belonged to the king of France."

On this question of right it is sufficient to recur to the edicts of the kings of *France*, made at different times, on this subject, and particularly to those of *April* 1683, *December* 1693, and *February* 1710, which are formally explicit on this point.

The power of royal edicts is universally known.—" They are," says the learned lawyer, editor of those decrees, " emanations of the sovereign authority, which form the most certain part of *French* jurisprudence, as well as the part most generally received.—The splendour of their immediate source secures to them a pre-eminence over all other laws. The will of the prince is equal to his power, and extends as far as the boundary of his empire. The ordinances are therefore the general laws of the kingdom, which, of consequence, must supercede not only the *Roman* law, which is in force only in countries of written law, but also in the laws established by our customs, which are only particular laws of the countries which have adopted them."

In consulting the authors who have written on the *French* laws, we find the principle laid down in the above cited edicts, acknowledged and confirmed in their works. Pothier, one of the most respectable of those authors, in his treatise on the law of demesne and property, part 1, chap. 2, sect. 3, art. 2, no. 159, expresses himself in these terms:

" By our *French* law, the alluvions formed on the borders of navigable streams and rivers belong to the king. The proprietors of riparious heritages can have no claim to them, unless they have titles of the grant made to them by the king, of the right of alluvion along their heritages."

This opinion seems indeed to be contradicted by that of Denizart, in his collection of decisions, at the article of alluvion, where he contends that the alluvions on the shores of the sea, streams and rivers belong to the proprietor of the

riparious heritage, and that what belongs to the king in the sea or in navigable streams, are the *atterissements* formed suddenly.

This same author defines an atterissement to be "a heap of sand and slime that the sea or the rivers transport from one place to another, which changes their bed and shores."

Without examining whether the distinction laid down by Denizart between *alluvion* and *atterissement* be strictly correct, whoever is acquainted with the river on whose shore the contested batture is formed, will agree that the term atterissement, as defined by Denizart, is still more applicable to it than that of alluvion. The *Mississippi* carries down sand and slime in great quantity and forms battures not indeed in an *imperceptible* manner, as the term alluvion implies, but *very visibly*, and so quickly that a single swell of its waters deposits usually nearly a foot of slime on the whole surface of a batture, insomuch that the course of the river is continually changing.

But *Denizart* is in a glaring error in applying the spirit of the royal edicts, already cited, merely to atterissements. We see in all the edicts enacted on this subject that the sovereign claims as his property, not only the atterissements, but also the *accretions* formed on the borders of navigable rivers. Now, what is here meant by accretion *(accroissement)* according to the learned compiler of the department of jurisprudence in the *Encyclopædia?* "Accretion," says he "is formed in various ways: the accession of which we have spoken above, is a real accretion; *alluvion* and *atterissement* are also species of the same."

The word *accroissement*, used in the royal edicts, is therefore a generical term comprehending that of *alluvion*. Nay, it is used there rather as synonimous with alluvion, for *accroissements* and *atterissements* are there spoken of as things separate and distinct.

Finally, in order to refute still more completely the opinion of *Denizart* and others who may have erred as he did, we

find in the edict of the 15th of *December*, 1693, the word *alluvion* itself expressly mentioned.

"*Lewis*, &c. greeting. The right of property which we have on all the navigable rivers of our kingdom, being incontestably established by the laws of the state, as a consequence and necessary appendage of our sovereignty, the kings our predecessors and ourselves, have, from time to time, ordered researches to be made of the isles and accretions which formed themselves thereon, &c.

"For these reasons, by the advice of our council, and with our certain knowledge, full power and royal authority, we have, by these presents, signed with our hand, said, decreed, and ordered, and do say, decree and order as our will and pleasure, that all detainers, proprietors or possessors of isles, islands, attêrissements, *accretions*, ALLUVIONS, rights of fishery, tolls, ferries, bridges, mills, ferry-boats, packet-boats, buildings, and rights on the navigable rivers throughout our kingdom, who shall produce titles of property or of possession anterior to the 1st of *April*, 1566, shall be therein maintained," &c.

But be it as it may as to the error of *Denizart*, and the opposition of his opinion to that of *Pothier*, whose authority is in every respect superior to his, we find both their opinions reconciled with regard to the point in question, by the explanation given by *Larasle*, the compiler of the department of jurisprudence in the *Encyclopædia*, at the word alluvion.

"It is to be observed," says he, "that to acquire by right of alluvion, two conditions are requisite: 1st. That the accretion be formed slowly and imperceptibly, so that one cannot discern the time when each portion of the alluvion was joined and consolidated with the heritage. 2ndly. That the heritages by virtue of which a claim is laid to *alluvion* be contiguous to the river, so that the bed on which it rolls appears in a manner to form part of the said heritages; for if they are not immediately bordered by the river, *but have for their boundary an intervening causeway or road*, that part which the river leaves uncovered between its bed and the

road cannot belong to the owners of the heritages situate on the other side of the road; *those lands belong to the king along navigable rivers*, and to the lord of the manor respectively, along such as are not navigable. Numerous edicts, ordinances, and letters patent have declared that all isles, islets, attérissements and *accretions*, belong to the king; excepting such as were possessed by the riparious proprietors in virtue of titles anterior to the year 1566.—See the edicts of 1663, 1668, 1670, 1693 and 1710."

Thus, though the authority of *Denizart* cannot be set in opposition to the formal expression of the law, which ordains that all manner of *accretion*, and namely *alluvions*, on navigable rivers, belong to the king; the case of the existence of a causeway, or a publick road, on the border of the river, forms an exception in favour of which all opinions may be reconciled.

SECOND POINT.

"*The plantation bordering on the limits of the city of New Orleans, was sold by the king to divers persons, in* 1763, *when the batture lying in front of that land already existed.*"

On this point of fact the testimonial proofs are such as to leave no doubt. Old and respectable inhabitants of *New Orleans* have solemnly attested it.—Therefore, considering that batture as an alluvion, formed on a navigable river, without reference to any other circumstance, we may apply to it the expressions of the royal edicts above cited, and the authority of *Pothier*, to establish that that *alluvion* or *accretion*, belonged to the king of *France*.

THIRD POINT.

"*Between the batture and the land sold, lay a royal road and a levee, which were then, and have still remained publick property.*"

This fact is established not only on the most respectable testimonial proof, but on the most authentick documents, to wit, on the official and judicial acts done at the time when the king sold the land lying contiguous to the limits of *New Orleans.*

That land belonged to the *Jesuits* during about 37 years, when, in 1763, their property was seized and confiscated to the use of the crown of *France.* The *Jesuits'* title being extinct by that confiscation under which their lands returned to the demesne, it is needless to take any notice of it. It no way affects the title arising out of the subsequent sale which they thought proper to make of that land.

The primitive title of *Jean Gravier* and of those from whom he derives, is then the sale made by the king in 1763, of the land contiguous to the limits of the city of *New Orleans.*

With a view to that sale, the land of the formerly *Jesuits* was surveyed by order of the king, and a process verbal of the survey was drawn up, conformably to which the purchases were declared. In that proces verbal, and in the one afterwards drawn up for the purpose of dividing the land into lots, and giving to each purchaser the portion assigned to him, it is stated that the boundary marks of the land sold were fixed at *six toises five feet from the middle of the levee that restrains the overflowing of the river*, that is on this side of the royal road which had already existed during a number of years in front of the gate of the city; so that the royal road (the same that exists at present) separated the purchased land from the river. This fact, which is clearly established in those proces verbals, is further confirmed by the deposition of the engineer *Mansuy*, who drew a plot conformably to those proces verbals, to supply the loss, as it appears, of

the plan drawn at the time by the engineer *Olivier Devezin.*

This circumstance is the more strongly established as herein reason accords with the fact. It could not be the king's intention to sell the road extending to the city whose streets were not more frequented than that road had been for several years. That high road was publick property, and as such could not come into the possession of an individual, without giving that individual a right to dispose of the soil for any private purpose, which, in this case, is repugnant to the principles of publick right.

It appears that it was attempted to be proved on behalf of *Gravier*, that the custom of the colony of *Louisiana* was, that the proprietors of plantations should leave a high road on the border of the river; that consequently the purchasers of the *Jesuits'* land lay under this obligation equally with others; and that the road already existing, in front of the land by them purchased, was to be considered as supplying the place of the one which they would have been obliged to make, if it had not existed.

This is a false application of a general usage to a very peculiar case. The titles of land in *Louisiana* derive almost universally from primitive grants made by the sovereign. Those grants expressed that the grantee was to fulfil certain conditions, and amongst others that of making a publick road on his land. But here a grant is out of the question; the subject matter is a *sale*, and wide is the difference between a grant and a sale, both in principle and effect....The lands which were granted in this colony were uncleared lands in a state of nature. No road or other accommodation existed on them. The king, therefore, in granting them stipulated that the grantee should supply the publick with a road: the grantee made this road at a reasonable distance from the river, nearer or further off, as he thought proper, and sometimes stopped up the old road and opened a new one; for provided there were a road convenient to the river, he fulfilled his conditions. The case here is entirely different: it is not a grant of uncleared land as far as the river; it is the

sale of land already made valuable by industry, in front of which runs the high road. That road makes no part of the land sold: the purchaser of that land has no right to encroach on it: it is publick property.

It is here an utter absurdity to suppose that the high road in front of the purchased land was implicitly sold with that land. For it would follow that the purchaser might convert the road to his private use, without being under any obligation to supply any other road; since his deed of sale does not contain the condition, found in grants, that he shall make and keep up a high road.

It appears that a construction favourable to the claim of *Jean Gravier* was attempted to be given to the expressions of the proces verbal above referred to, wherein it is said that the land purchased by those from whom *Jean Gravier* derives, has so many acres in front *on the river;* and that it was contended that this expression meant that the land was bounded by the water. But those words, it is evident, have no other meaning than to designate the situation of the land. A house said to be situated on the sea need not, to make the expression correct, have its walls washed by the waves. A plantation may with propriety be said to be situated on a river, though it be separated from it by a high road. The king of *France*, as we have seen, was, before the confiscation of the *Jesuits'* property, proprietor of the alluvion which began to be formed in front of their land; yet it is probable that the plantation of the *Jesuits* was said *to have its front on the river*. Those expressions must in all cases be understood in a sense that agrees with the fact. Now, the fact is that there existed a royal road and a levee, along the river in front of the land in question; that consequently that land did not extend as far as the water, and that in reality the boundary marks of the front of the lots sold by the king were laid at forty-one feet from the centre of the levee. The lots sold were to have fifty acres in depth, beginning from that boundary: all encroachments on this side, or on that side, of those fifty acres is an usurpation.

Thus then at the period of the sale of the land at present possessed by *Jean Gravier*, the king of *France* was proprietor, not only of the batture, alluvion or accretion already formed in front of that land, but also of the royal road which ran along the border of the river. He had acquired the property of said batture by the mere circumstance of its being formed on a navigable river, according to the expression of the royal edicts already cited; and even though that law had never existed, yet he would have acquired the same property as proprietor of the royal road and of the levee which was really the ground bordered by the water, or riparious. Finally, that property incontestably accrued to him by the concurrence of those two circumstances, according to one of the authorities referred to above.

.....

FOURTH POINT.

"*The alluvion situate in front of the suburb of St. Mary has never ceased to be part of the sovereign's demesne.*"

It is evident that when *France* ceded *Louisiana* to *Spain*, the right of the king of *France* to the property of all the alluvions then formed on the *Mississippi* was conveyed to the king of *Spain*, and that if the king of *Spain* had thought proper to avail himself of that title, he might have remained proprietor of all those new grounds.

The king of *Spain*, through liberality towards his subjects, left to the inhabitants of the borders of the river, in general, the quiet enjoyment of those new grounds; and for the encouragement of agriculture in this colony, which was as yet in its infancy, he constantly permitted them to be converted into cultivated fields, not even at any time hindering the proprietors of plantations in front of which they were formed, from altering the scite of the high road, in order to take possession of them. Hence it follows that the battures already formed at the period of the cession of this colony to *Spain* are now become the property of the riparious inhabitants by

right of long possession, as securely as those formed since are their property by the *Spanish* laws. But has this general dispensation of the king of *Spain's* beneficence admitted no exception? Is there no example of his having reserved to himself the rights he had to the alluvions, the property of which was transferred to him by the crown of *France?* Surely there is at least one instance of this, in the case of the batture in front of the suburb *St. Mary*. The conduct of the king of *Spain* with regard to that batture evinces his intention to retain his right to it; and his motive is very obvious. That batture had for several years supplied the wants of the publick, and particularly those of the inhabitants of the city of *New-Orleans*. It was there they got earth for building, and for raising their grounds; there they stored wood for fuel, fences, plank, timber for building, &c. it was a ground of general utility. It was indispensably necessary to government itself, for raising the streets of the city, for the levees, the fortifications, and for other publick uses. The king of *Spain* therefore retained his right to that alluvion as its situation rendered it invaluable to his subjects and to himself. It was his will that it should remain publick ground, and he constantly opposed all encroachments attempted by individuals. He caused ordinances to be proclaimed to that effect, and even caused to be demolished the buildings which several individuals had ventured to construct on it. In short, to the time of the retrocession of the colony, he never ceased to act, with regard to that batture, as its proprietor. All these facts are established on the most authentick evidence both written and oral.

It is then incontestable that the batture situate in front of the suburb *St. Mary* was a part of the demesne of the crown of *Spain* at the period when that crown ceded back that colony.

FIFTH TOINT.

" Neither Jean Gravier, nor those from whom he derives his title, ever possessed the batture in question; and Bertrand Gravier himself, at the time of his laying out a suburb in front of his plantation, declared that he had no claim to the alluvion."

It is a fact incontestably proved that neither *Jean* nor *Bertrand Gravier*, nor any of those through whom this claim is derived, ever possessed a single inch of the batture in question. It is further remarkable, that they never set up any title to that effect, and that not one of the encroachments attempted on that batture, was made by them until the year 1804, at which period *Jean Gravier* resolved, for the first time to claim it. But a circumstance of still more weight, is that *Bertrand Gravier* himself, when he converted the front of his plantation into a suburb, declared that he considered himself discharged from the duty of repairing the publick road and the levee, because the front of his land was become publick property; so that since that period the government and the city had been at the expense of keeping the road and the levee in repair. It is also to be remarked that at the time of *Bertrand Gravier's* death in 1797, it was so well understood that he could have no pretension to the batture in front of the suburb *St. Mary*, that not only no mention is made of it in the inventory of his property, but that it is excluded from his property by the very expressions of that inventory, and especially by those of the valuation of his plantation of which here follows the literal translation:

" About thirteen acres of land, of which the plantation is estimated to consist, including the garden ground; *from which land the most useful portion has been retrenched on the front*, so that what remains of it are the lowest lands which close towards the depth, and are surrounded with bad fences; a part of the best land on the side having been sold to Mr. *Navarro*, to Mr. *Percy*, and to the negro *Samba*; which thirteen arpents, with twelve negro cabins, have been estimated by the appraisers at the rate of one hundred and nine-

ty dollars per acre in front by the existing depth, amounting in all to two thousand four hundred and seventy dollars."

All these facts would not give a title to the sovereign, if he had it not already, neither do they add any thing to the title he has; but they evince that the opinion of *Bertrand Gravier* and the opinion of the publick perfectly accorded with the truth, and that the pretensions of his successor are as extraordinary as they are ill founded.

The undersigned counsel concludes from the above discussion, that the *United States* are now the real proprietors of the batture, accretion or alluvion, situate in front of the suburb *St. Mary;* and that if they claim it, the courts of justice cannot but acknowledge and confirm their title.

Deliberated at *New-Orleans*, on the 21st of *August*, 1807.

P. DERBIGNY.

EXAMINATION

OF THE

TITLE OF THE UNITED STATES

TO THE LAND CALLED

THE BATTURE.

BY EDWARD LIVINGSTON, ESQ.

.....

THIS title is supported—

FIRST. By an incorrect and imperfect statement of facts.

SECOND. By an assumption, that the question is to be decided according to the principles of the *French*, not those of the Imperial or *Spanish* law.

THIRD. By an erroneous statement of that law.

The whole fabrick of this imaginary title is founded upon the statement which supposes that in the year 1763, the sales of the Jesuit's property were made only to the road, and that they were bounded by a front line running on the inside of the levee and road. It will be clearly demonstrated that this position is totally unsupported; but that the contrary, to wit, that the sale of the Jesuits property under which we claim, were bounded on *the river*.

In order to understand fully this point, it is necessary to remark, that all the grants made by the *French* or *Spanish* governments, without, as it is believed, any exception were bounded *by the river*, but all expressed under the general terms *face au fleuve*, or *face sur le fleuve*, or sometimes under the more general terms *face* alone, which according to the testimony of all the surveyors, related to the place on which the lands were laid out, as the *river*, *bayou*, &c. So that if the lands lay on a *river* or *bayou*, the word *face* alone would, according to the general construction of the country, give a

front on the *river* or *bayou*, unless there were some restrictive words which expressed the intention of the parties to be different.

It appears as well by testimony as by the express admission of the parties* in this cause, that the *soil of this road* was not reserved to the king, but merely the *use of it* vested in the publick, since the proprietor made and changed it at his pleasure, as the encroachment or alluvion of the river, or as his own convenience required. There is every reason to believe that the grant to the *Jesuits* was in the usual form and was bounded by the river, but we are not left to presumption on this point. Though the original grants to the *Jesuits* be lost, yet in the proceedings which took place in the year 1763, preparatory to their division and sale, we find a certificate of the proper officer to the following effect:—

"In the year 1763, on the 14th day of *July*, we the undersigned, counsellor of the king, inspector of the roads, and surveyor general of the province of *Louisiana*, certify that by virtue of the orders of Mr. *Dobadie*, commissary-general of the navy, &c. dated this 13th instant, by which we were directed to transport ourselves to the habitations of the persons calling themselves *Jesuits*, &c. there to examine the titles and papers relative to the possessions of the aforesaid persons, which we found *ought to contain thirty-two arpents of front on the river St. Louis.*" And in the same proceedings, is a lease made by the *Jesuits* of a part of their land, in which the lessee binds himself to make the levee and the road.

The original grant then was like all others bounded by the river, and the defendants in their case have taken pains to state that the batture or alluvion then existed. This perhaps

* Vide Derbigny's opinion, 3d point, page 300. "The grantee made this road at a reasonable distance from the river, nearer or further off as he thought proper, and sometimes stopped up the old road and opened a new one, for, provided there were a road convenient to the river, he fulfilled his promise."

was the fact,* but to a very inconsiderable extent. But this will make no difference in the case; for if there was an alluvion in the year 1763, whether it had prior to that belonged to the king or to the Jesuits, at that period the whole plantation with its batture became the property of the crown by the forfeiture of the Jesuits' estate, and the king at that time ordered the estate to be divided and sold....Did he grant the *whole?* or did he reserve the batture and the road?

Let us examine this point—

By the proceedings before referred to, it appears to have been the intention to divide and sell "all the said lands."†

By the adjudication, it is granted with "all† its members and appurtenances without *reserving any thing:*" by the adjudication of the sixth lot (the farthest extremity of the land and not now in dispute) one † acre was reserved to the king, so that it appears whenever the king wished to retain any part, his officers took care to insert the reservation in the deed.

Besides this, it is stated in the case, and proved on the trial, that governor *Carondelet* had at three several times directed *Gravier* to make the road and the levee, once by a letter which not only ordered him to repair the levee, but carries some evidence of his having done it before, because he speaks of his "*known exactitude.*"‡ Now if the road and levee were reserved to the king, what had *Gravier* to do with working it? or if the road and levee were not comprehended in the sale of the *Jesuits'* property, and as they allege in this case, had been constantly considered as part of the de-

* Recent discoveries have made it probable that a great part of the land lying outside the levee, which was called alluvion by the witnesses, was really as much original soil as any other part of the country, since in digging a canal since the judgment, the stumps of a grove of cotton trees have been discovered in their natural position about three feet under ground, and measuring two feet in diameter.

†‡§ See Note A. ‡ See Note B.

mesne, how is it that *Baron de Carondelet* was ignorant of this circumstance?

It was therefore clearly the intention of the king not to reserve any thing, but on the contrary to sell the whole plantation, of which the alluvion formed a part. What motive could he have had for such reservation? The defendants and their counsel say, for the use of the city*—but a reservation to the crown would have been of no use to the city, and if this had been the intent the reservation would have been accompanied by a grant to their use. Let it also be remembered that the *Jesuits'* plantation consisted of thirty-two *arpents* in front, of which *Gravier* possessed only thirteen; the residue was sold to different persons at *the same time*, under *the same circumstances* and by the *same words* with those employed with respect to *Gravier's* part; yet the batture on the nineteen remaining acres, infinitely more extensive than that now in question, has been uninterruptedly held by the proprietors of the original soil; the publick have never that I have heard pretended to it; nay the very persons most clamorous against my title, now hold property to a very large amount on those very battures. If, therefore, my title be defective and theirs good, we must look for the difference in something subsequent to *the sale* of the *Jesuits'* property under which we all hold.

The error (and when made by persons who so well know the customs of the country as the defendants it deserves an harsher name;) the error, lies in representing the line always drawn in front, generally within the levee, as a front boundary; when they know, and their own witness (one of the defendants, the surveyor-general of the province) stated that such front line was drawn not to mark a boundary be-

* The Jesuits possessed a tract of land one league and a half above the town on the other side of the river. Unfortunately for this argument it happens that this land is sold precisely in the same terms with those used with respect to the plantation near the city. See Note C. *Did the king reserve this also for the use of the city?*

tween the plantation and the river, but to measure the extent of its front; which was always done on a direct line, and never followed the windings of the river; and that the stakes placed on the side lines were not intended to mark their extent towards the river, but to show the direction of those lines, whether they opened, closed or were perpendicular to the river.

The certificates in note D, show this to have been the universal practice, in all the surveys under the *French*, *Spanish* and *American* governments.

But even if this line, contrary to the universal and uninterrupted usages of the country, to the whole course of evidence in the case, and finally, to the dictates of common sense; if contrary to all these, the line of *admeasurement* is to be turned into a line of *boundary*; yet it will avail them nothing, for it so happens that in this case the line of admeasurement crosses the levee a few toises from its commencement and continues *on the batture outside of the levee during the whole of its course through the part now constituting the suburb St. Mary.** So that even if this notable discovery made by the corporation and their counsel be true, they will not derive from it the pleasure of disturbing *Gravier's* possession by a claim from the *United States*; for their great argument of an intervening road and levee, totally fails them in this instance. But they will have the gratification of disturbing almost all the other titles in the country; for most of those lines of admeasurement are in other instances drawn within the levee and road: so that if this principle be admitted, scarcely a single plantation will be bounded by the river; and congress may make it inaccessable whenever they please to most of the inhabitants, for not one in an hundred have any exclusive possession between the road and the river.

* This appears from a map which has been carefully protracted by Mr. Lafon from the *proces verbal* of the Jesuit's survey; a copy of the map and *proces verbal* are filed for the inspection of those who may desire it in the office of Mr. Pedesclaux.

A conclusive proof however, that the river was the front boundary of the *Jesuit's* plantation, as well since as before the division and sale of 1763, has been discovered since the trial.

Under the *French* government a general plan was kept by the surveyor general, on which the lines of each concession were distinctly and accurately laid down. This was called the *Plan Terrier*, and the original or a copy was delivered to the *Spanish* surveyor general on the transfer of possession. He delivered copies of this plan to his deputies, and it was always considered by the *Spanish* government as an authentick record. On an extract of this map, which was thus delivered in 1795, the plantations above the town for the distance of about four leagues, are all delineated; in all of them the side lines extend to the river, which is laid down in every instance as the front boundary.

Among these plantations is that of the *Jesuits*—On the plan are marked the names of the persons who then held under the sales of 1763. But no such front line as Mr. *Derbigny* has imagined is found on this plan—no road as the boundary—nothing to distinguish it in this respect from the neighbouring plantations, which as I have said, are all bounded on the river.

Yet this plan was given in 1795, at a time when the alluvion was considerable in extent, seven years after the suburb was laid out, and long after the time at which, as is now pretended, *Gravier* had abandoned his right.

This plan too, completely disproves the idea of a reservation of the front part by the sales of 1763. For it delineates with great care and precision, the reservation of a small part near the town—designating minutely the difference between the old limits of the *Jesuits'* plantation on the side next the town, from those established in the sale of 1763. If then any reservation had been made by the king of the alluvion or land in front, would it not have been noticed with the same care as has been shown as to the lateral lines?

This document is alone so convincing that if an engraving can be prepared in time it shall be annexed to this work.

It is then I think proved—

First. That the ancient habitation of the *Jesuits* bordered on the river. And this fact is further proved by their having repeatedly changed the levee beyond Madame *Delar's*, in order to *take in* the alluvion.*

Second. That the sale of their property was made without any reservation.

Third. That by the sale of 1763, no new boundary was fixed between the front of the habitation and the river; in other words, that the several subdivisions as well as the original grant extended to the river.

It is therefore of no consequence whether there were or were not an alluvion formed at the time of the sale of the *Jesuits'* property. On either supposition, the grant going to the river gives us all within its lines, whether alluvion or original soil.

Second error in fact—

In the defendant's case, it is stated, that the batture called "the *Jesuits*" after the transfer of possession in 1767, continued to be considered as a part of the "*royal demesne;*" and as such was of publick utility in supplying earth, without any claim being made to it by the proprietors or purchasers of the *Jesuits'* plantation, either before or after the cession.—And in the counsel's opinion, he says that it "never ceased to be part of the *sovereign's demesne*," and strangely asserts that "it is a fact *incontestably proved*, that neither *Jean* nor *Bertrand Gravier*, nor any of those through whom this claim is derived, ever possessed a single inch of the batture in question. It is further remarkable, that they never *set up any title* to that effect." p. 305.

It is somewhat extraordinary that this statement should be made by that very corporation, which for three years had

* The existence of the old levee as well as the map above referred to, prove this fact.

been contending in a court of justice, that the premises belonged to the city of *New Orleans*, and that the same counsel who during the whole of that period asserted in three several arguments, the unequivocal right of the corporation, should now as boldly pronounce that they never had any title, but that it always belonged to the *United States*.

Did the learned counsel give his true opinion to the corporation, when he was first called on to defend their cause?

If he did, how can the corporation justify the thousands of dollars they have expended in defence of a claim which their counsel must have told them was unjust?

Did the learned counsel suppress his true opinion, and flatter the city with the hope of gaining what he knew did not belong to them but to the *United States?* A case not to be supposed.

Or has the learned counsel after three years study of the cause changed his opinion of its merits?

A revolution then, of three other years, may perhaps prove that his seeond opinion was as erroneous as his first, and if the United States have the same confidence as the corporation in the advice which is so kindly offered them, they may be induced to spend as many thousands as the city have done, and with equal success.

The error of this statement of facts appears—

First. By the allegation of the persons themselves who make the statement, and those allegations, too, on record.

On the 16th of *March*, 1805, the mayor in behalf of the city, filed a bill to perpetuate testimony in this case, in which they state, "that *Bertrand Gravier* was the owner of the plantation; that he had laid out the front part into lots, in 1788; that *after* the said lots had been sold he considered himself as *no longer* bound to preserve the levee; that on being called on by the governor to repair the road, he declared that having converted his plantation into a fauxbourg, and sold the line of the lots on the side of the river, whatever intervened between those lots and the river belonged to the publick, and was *no longer* his concern; that *in conse-*

quence of this formal relinquishment, the Spanish government immediately caused the necessary repairs to be made, and the *inhabitants* of *New-Orleans have ever since*, without hindrance, &c. possessed and enjoyed the same premises, &c."

In their answer to the petition of *Jean Gravier*, the mayor, aldermen and inhabitants, repeat the same idea. After denying the right of *Jean Gravier*, they say, "that the truth is that sometime before the death of *Bertrand Gravier*, the first owner of the plantation on the front of which the suburb *St. Mary* was established, he the said *Bertrand Gravier had abandoned and himself acknowledged in an unequivocal manner to have abandoned* all the above mentioned parcel of land; that *in consequence of such abandonment*, the high way and levee have been maintained and repaired *then and afterwards*, till this moment, either by the *corvees publique*, or at the expense of the city; that *since that time* till now, the *inhabitants of this city* never ceased to have a peaceful enjoyment of the said parcel, either to place different wood-yards or for unloading flat bottomed boats and other rafts, *with permission* of the *corporation*." And their answer concludes by avowing, that "the city council had erected a cabin on the land to lodge a guardian, and that they had caused the earth to be digged and carried away to repair the levee."

Yet with these allegations on record, in which they derive a title under *Bertrand Gravier* by virtue of an abandonment, in 1788; in which they say *the land belongs to and is possessed by the city;* the corporation in their statement do not blush to assert, that the same land had continued ever since the year 1767, to be considered as part of the *royal demesne*, and that too, as they say, under the name of the "*Jesuits'* batture."

If it was royal *demesne*, how could the inhabitants of the city have enjoyed it? Was it not as strictly forbidden under the *Spanish* as under the *American* government, to intrude on the publick property? If it was royal *demesne*, how did it acquire the name of "*Jesuits' batture?*" If it was royal *demesne* how could the corporation have the right

to give *permission to the rafts and boats to unload*, or for the dealers in lumber to deposit their wood there? Thus we see the allegation contained in the case, is not only at war with the truth, but is also expressly contradicted by the declarations of the defendants themselves *upon record*. Let us now examine the residue of this sentence, viz. "that no claim was made to the premises by the proprietors or purchasers of the *Jesuits'* property, either before or after the cession;" and the still stronger assertion of the counsel in his opinion, that it was "a fact incontestable proved that neither *Jean* nor *Bertrand Gravier*, nor any of those under whom this claim is derived, ever possessed a single inch of the batture in question. It is further remarkable that they never set up any title to that effect." I cannot comment upon the subject of this statement as it deserves, without departing from that rule of moderation which I have imposed upon myself in pursuing this enquiry: I will, therefore simply state the proofs by which the reader will be enabled to appreciate the value of these allegations—allegations which ought to have been maturely weighed before they were hazarded by the corporation, or re-echoed by their counsel. They should have considered, not only from the regard always due to truth; but from the reflection that this case was to become the ground-work of an application to the *United States*, to prosecute their claim at a great expense to them and with great inconvenience to the individuals concerned; that the doctrines contained in it, give rise to a most important and serious question, which, if resolved in the manner they seem to desire, will not only forever deprive the town of this species of property in the very city itself, but also ravish from the inhabitants all the alluvions that have been formed since the establishment of the country. It ought also perhaps to have occurred to the counsel, if not to his clients, that after the Superiour Court had given an unanimous opinion in this important cause, it was hardly treating the judges with proper candour not to state with more care the evidence upon which they pronounced. The corporation

say that the purchasers of the *Jesuits'* plantation never *claimed* the batture in front of the suburb *St. Mary;* and their counsel asseverates the same thing as having been incontestably proved. Why then in the passages I have quoted, did the corporation claim under *Gravier*, by virtue of his abandonment? Abandonment supposes right, possession, or at least claim of right. If *Gravier* never claimed, then *Gravier* never could abandon. Are the allegations of the corporation in their pleadings, or in their case to be believed? *Gravier* "never claimed," say the defendants and their counsel; yet he sold a lot on the batture on the 12th of *April*, 1794, to *C. F. Girod*, on the same day another to *Wiltz*, on the same day a third to *John Scott*, on the 12th day of *January*, 1795, two others to Mr. *Pierre Foucher:* reserving in the three first the right to dig earth for his brick-kiln. These deeds were *all on record*, were all produced on the trial, and could not have been forgotten. "*The batture was royal demesne, and Gravier never set up any claim to it.*" Yet governor *Carondelet*, in a letter dated the 10th of *March*, 1794,* commands him to make the levee and compliments him on his former punctuality. He repeats this order at two different times; once by Mr. *Livaudais* and once by Mr. *Mentzinger*, and according to the uncontradicted testimony of Mr. *Segur* and Mr. *Laroche*,† he thought it necessary to ask Mr. *Bertrand Gravier's* permission, and, after his death, that of *Jean Gravier*, to lay the rafts of royal masts on the batture.

What then becomes of this "fact so incontestably proved?" But I might have contented myself with the consultation itself, to show the error of its statements on this point. At page 300 of the opinion, the third position of the counsel, is, that between the alluvion and the land sold (viz. the sale in 1763) "lay a royal road, the same that still exists, and a

* See note B. † See note G.

levee, both which *were then and have still remained publick property.*"*

Here we find a broad assertion that the levee and the road were then, viz. 1763, and still are, publick property; yet at page 305, of the same opinion, we find the old ground of *Gravier's* abandonment resorted to, and the date of the publick title fixed to the laying out the fauxbourg, (1788.)

But a circumstance of "*still more weight*" (says the counsel) "is, that *Bertrand Gravier* himself, *when he converted the front of his plantation into a suburb*, declared that he considered himself discharged from the duty of repairing the roads and the levee" [what duty if the road and levee had ever since 1763 been publick property? or how could he be *discharged* from a duty which according to the counsel's third position must have been always that of the publick] because the front of the land was now become publick property: so that *since that period*, the government and the city have been at the expense of keeping the road and the levee."

How difficult is the support of error! since even the acknowledged abilities of the learned counsel have not enabled him to write ten pages, without contradicting the witnesses, contradicting the records, and contradicting himself.

Third error in fact—

In the case stated, page 288, the defendants alledge "that when the sales were made" (24th *November*, 1763) "*Louisiana* still belonged to *France*, and was under the dominion of the *French* laws." On the 3d day of *November*, how-

* Yet Mr. Laveau Trudeau declared on oath that he thought Gravier had a right to sell the batture: and that when called on to ascertain his upper limits, he had began the survey from the middle of the levee, and not from the inside of the road as he would have done if the road had been publick property or the boundary of the land.—Did the counsel forget this testimony? or was the *Surveyor-General* as well at the *Governor* ignorant of this *notorious fact*? See his examination, note E.

ever, in the preceding year, *Louisiana* had been ceded by *France* to *Spain**; and although possession was not immediately taken, yet it will not be pretended that the king of *Spain* could acquire any rights by virtue of the *French* laws, supposing them to be as they are stated by the defendants.

The whole then of the title in the *United States* so lately discovered, so contradictory to that which the parties who now support it, have alleged, must fall with the discovery, that at the time our title commenced, the king of *France* had abandoned the sovereignty, and of course could by virtue of this pretended prerogative claim no right to seize the alluvion, and shut out his subjects from the river on which he had bounded their grants.

Having pointed out some of the errors in fact in the defendants statement, and shown that this cause is to be determined according to the *Spanish* laws; I ought, perhaps, from an examination of those laws to prove that they give the alluvion in all cases to the proprietor of the adjacent soil; but that point seems to be conceded not only by implication in attempting to substitute the *French* for the *Spanish* laws, but expressly in page 303 of the opinion, where it is said that the alluvions formed since the cession, are the property of the front proprietors, by the *Spanish laws*; but to remove all

* If it should be objected that this argument injures the title of Gravier by showing that the king of France had no right to sell to those under whom he claims; there are four answers, all of them conclusive:

First—That the king of France may be considered, during the interval between the cession and the delivery of possession of the country, as only the trustee for the king of Spain; and that, therefore, all his acts permitted and not revoked by the latter power on taking possession, are valid.

Second—That though not *de jure* yet *de facto*, France was sovereign of the country: therefore, all sales made by the actual possessor to a *bona fide* purchaser, are valid.

Third—That we are now in possession, and that the United States cannot prevail by the weakness of our title, but must show a conclusive one in themselves.

Fourth—That by the fundamental laws of Spain, the king could not acquire this species of property.

doubt upon this point, I refer to the authorities cited in note F. *post.*

But although I have clearly shown, that this question is not to be decided by the *French* but the *Spanish* law, I can with ease deprive my opponents of even the semblance of an argument by showing, thirdly, that both by the general laws of *France* and by special grants, the alluvions of the *Mississippi* belong to the proprietors of the adjacent soil, and not to the king.

The right of the adjacent proprietor is so consonant to the principles of natural law that it would require strong arguments to prove that any laws could permit a sovereign, after having bounded his grantee on the river, to cut him off from its use by seizing on the alluvion which might be formed on its banks. Let us examine carefully before we pronounce, that the *French* jurisprudence is liable to this reproach.

The laws relied on by the defendants, are the edicts of 1683, 1693 and 1710, and the opinion of *Pothier.* Of the edicts, the counsel has selected that of 1693, as the most favourable to his position. Let us examine this edict, without, however, subscribing to the doctrine, that any of the king's edicts could without further formality, change the general civil law of the kingdom, and with the observation that many of the provinces had their particular privileges, which they always preserved and which were enforced by the tribunals. In the very instance now before us, long after this edict, it is held by *Denizart*, by the authors of the jurisprudence of the *Encyclopoedia*, and other authorities which I shall cite, that the law of the land is the reverse of that said to be enacted by the edict.

The ideas I had formed on this subject are confirmed and strongly expressed by *Portalis*, in his preliminary discourse to the civil code:

" Sous l'ancien régime, la loi étoit une volonté du prince —cette volonté étoit adressée aux cours souveraines qui étoient chargées de la verification et du dépôt des lois—la loi n'étoit point exécutaire sans un report avant d'y avoir été

vérifiée et enrégistrée—La vérification étoit un examen, une discussion de la loi nouvelle. Elle représentoit la déliberation qui est l'essence de toutes les lois—l'enrégistrement étoit la transcription sur le régistre de la lois vérifiée—les cours pouvoient suspendre l'enrégistrement d'une loi, ou même la refuser—elles pouvoient modifier la loi en l'enrégistrant, et dès lors ces modifications faisaient partie de la loi même. Une loi pouvoit être refusée par une cour souveraine et acceptée par une autre—elle pouvoit être diversement modifiée par les diverses cours."

" Under the former government the law was the will of the prince—the expression of this will was addressed to the Superiour Courts, which were charged with the verification and deposit of the laws. No law could be executed in any jurisdiction until it had been verified and registered therein. The verification was an examination or discussion of the new law—it represented that deliberation which is essential to all laws—The registry was the act of transcribing the law thus verified on the records. The courts might suspend the registry or even refuse it—they might modify the law when they enregistered it, and from that moment those modifications became part of the law itself. A law might be refused by one Superiour Court and received by another—and it might be differently modified by different courts."

The edict declares that the king has an incontestable right upon *(sur)* all the navigable rivers, and that he and his predecessors, have caused researches to be made of isles and accretions *(crements qui s'y sont fait)* which had been made *therein*, and not *thereon*, as is translated in the opinion; and he confirms the ancient possessors of all islands, *atterissements*, *alluvions*, &c. in their possessions on paying certain dues to the crown. Now, in this edict I can find no declaration of any thing but that the king had an incontestable right upon the navigable rivers of his kingdom,* and that he

* Probably because the grants on those rivers, were not bounded by the river, as we have shown ours, in common with all the others in the country, to have been.

Alluvion is defined in the *French*, precisely as it is in the *Roman* and *Spanish* laws, to be an "increase of land, which is made by degrees *(peu a' peu)* on the shores of the sea, of navigable and other rivers, by the earth which the water brings there." This definition is taken from *Guyot's Repertoire Universelle*, a work of great merit, compiled by upwards of forty counsellors, from different parts of the kingdom, and published in 1784. The whole article is transcribed in the margin,* and I deduce from it these important consequences:

* "ALLUVION. Accroissement de terrien qui se fait peu a' peu sur les bords de la mer, des fleuves et des rivieres par les terres que l'eau y apporte.

"Le droit Romain met l'alluvion au nombre des moyens d'acquérir par le droit des gens, comme étant une espèce d'accession; en sorte que l'accroissement fait imperceptiblement demeure à l'heritage auquel il se trouve réuni. Cela est fondé sur la maxime qui veut que le profit appartienne a' celui qui est exposé a' souffrir le dommage.

"Cette disposition du droit Romain est suivie dans le royaume, excepté neanmoins en Frenche-Compte ou' l'on tient pour maxime que la riviére de Doux qui arrose cette province, *n'ote ne ni baille;* c'est-a'-dire, qui celui dont cette riviére dominue l'heritage en l'inondant peut prendre son indemnité dans le terrein qu'elle laisse a' découvert.

"Il faut aussi excepter les héritages voisions de la rivière de la Fère qui suivant une coutume locale d'Auverge, *n'ote ni ne baille.*

"L'article 195 de la coutume de Normandie porte que les terres d'alluvion accroissent aux propriétaires des héritages contigus à la charge de les *bailler par aveu* au seigneur du fief et d'en payer les droits seigneuriaux comme des autres héritages adjacens.

"Les coutumes de Sens, d'Auxerre et de Metz ont des dispositions semblable et sont admises pour de règle dans le droit Francois.

"L'accroissement fait par alluvion prend les qualités de fief, de de roture, de propre ou d'acquet que peut avoir l'héritage accru, et il est sujet aux mêmes charges.

"Il n'en seroit pas de même d'une augmentation arrivée subitement a' un héritage par un débordement ou par quelqu' autres cas fortuit. Cette augmentation appartient au roi dans les rivières navigables et aux seigneurs haut justiciers dans les rivières non navigables." *Guyot's Repertoire Universelle, page* 113.

First—That the doctrine of *Pothier* is here shown, not to be the general law of France, but an exception to that law in the particular provinces, which are enumerated.

Second—From the part of these articles, which states the custom of Normandy to be, that the proprietors of the adjacent land shall have the alluvion, "*a lacharge des les bailler par aveu au signeur du fief et d'en payer les droits, seigneuriaux*," &c. that is, on condition that he shall make an acknowledgement (which is in the nature of homage in the English law) to the *feudal lord*, and pay his seignorial dues, &c. "The customs of *Sens*, *Auxerre nad Metz*, have similar dispositions, *and are admitted to serve as a rule in the French jurisprudence.*

Here then I think we may plainly discover, that if the king of France has any right to alluvions, he has them as *feudal lord*,* that even in lands held under this tenure, the proprietor would have a right to the property, paying the usual rents, and rendering the accustomed homage, but that in land not held under a feudal tenure, the king could have no pretensions to this accession of property, which would belong to the proprietor by the law of nature, to which this right is expressly referred by the Justinian code.

Should this reasoning be well founded, the dispute is at an end with respect to this property, which is expressly granted in *franc aleu*,† or *allodial tenure*, as we should express it in the language of English jurisprudence. "*Franc aleu*," as appears from the following definition taken from the "*Coutume de Paris*," page 144 "is an inheritance which is subject to no seignorial rights or duties, either honorary as fealty and homage, or pecuniary as rent, fifth relief, or others that may

* Since the first publication of this work I have found my reasoning on this subject confirmed by the highest authority—Portalis in his preliminary discourse to the second book of the French code, expressly refers this claim of the crown to a *feudal* origin—And moreover positively declares the whole law of alluvion to have been *settled* in favour of the adjacent proprietors long before the revolution.

† See note A.

be due as acknowledgements of the tenure from the superior lord; it is therefore that it is thus called *quasi liberum et solutum ab omnibus juribus.*"

The authority of the *Encyclopædia* is also cited to show a difference between the *Spanish* and *French* laws on this point. A very cursory examination of the article will show its misapplication to the defendant's case. The whole text, (for the defendants have only quoted as much as they think suits their purpose) reads thus:

"Alluvion is an increase of the ground which takes place by slow degrees, on the shores of the sea, on the borders of *fleuves* and rivers; occasioned by the earth which the water conveys to it, and which becomes so consolidated with the contiguous land that it forms a *whole with it—an identity.* The name of alluvion is also given to those lands which are slowly and imperceptibly left uncovered by the water.

"The *Roman* law places alluvions in the number of the means of acquiring according to the laws of nations, as being a kind of accession: that augmentation, being operated in a slow and imperceptible manner, remains to the inheritance to which it is found united.

"The portion which is thus added insensibly is not considered as a new land, it is a part of the old which becomes possessed of the same qualities, and it belongs to the same master—*in the same manner as the growth of a tree from parts of the tree*—and is the property of the proprietor of the tree. That right of increase by alluvion is grounded in the maxim of right, which bestows the profits and the advantages of a thing, to him who is exposed to suffer its damages and its losses.

"*The regulations of the Roman law on alluvion are generally followed in France*—the usages of *Metz*, of *Sens*, and of *Auxerre*, have on that subject precise regulations, which form their common law.

"But the province of *Frenche-Compte* must be excepted, where it is established as a maxim that the river *de Doux*,

neither gives nor takes away—that is to say, that the person whose inheritance is diminished by the inundation of the river, may indemnify himself by possessing himself of the land which it has abandoned.

" The same thing takes place on the inheritances bordering on the river de la Fère in Auvergne, where the local *coutume* establishes the same right.

" The alluvions which the sea produces on the lands which it bathes, also belong, as a right of increase, to the proprietor of those inheritances, who may also make levees or dykes to secure them.

" We must observe, however, that to acquire by right of alluvion, two conditions are necessary....

" First. That the increase should be made slowly and imperceptibly, in such a manner that it cannot be discovered in what time each part of the alluvion has been formed to and consolidated with the inheritance.

Second. That the inheritance by virtue of which the right of acquiring by alluvion is claimed, be contiguous to the river, in such a manner that the bed on which it flows, seems as it were, to be a part of the same inheritance; for in case it did not bound exactly to the river, and that it was bounded by a cause-way or by a road, the parts left uncovered by the river between its bed and the road, cannot belong to the proprietor of the inheritance situated on the other side of the road. Those lands belong to the king in navigable rivers, and to the feudal lords in those that are not so."

Here we find the Roman law expressly recognized, as being generally followed in France, with the exception of the districts enumerated in the former authority, and then follow the passages selected by the defendants, which in no sort whatever, weaken the effect of the prior passages of this authority.

They are—

First. That the alluvion must be formed slowly and imperceptibly, so that the time of the incorporation of each part with the original soil, cannot be discovered. When the

ingenious counsel can analize the different deposits, separate the sands of the Red river, the rich mould of the Missouri, from the clay and other various soils which the Mississippi receives from a thousand tributary streams; when he can dive into its turbid eddies, watch the moment of the precious deposit, and date the existence of each stratum of its increase; then this first branch of the authority he has cited may be applicable to his cause.

The second point, viz. that no proprietor can claim any alluvion, unless his lands are bounded on the river is true, not only in the French, but in the Roman and Spanish jurisprudence; and therefore it ought certainly not to have been cited in an argument to prove that they differed. As my adversary, however, can make no use of this part of his authority, it is a pity that it should be cited for nothing: I will therefore use it as a strong corroborative proof of the argument I used to show the reason why, on certain navigable rivers in France, the alluvion belonged to the king, to wit: that the grants there were bounded by the road, not by the river. The concluding lines may also serve to strengthen my reasoning, and to prove the feudal origin of the local variations which the French have made from the imperial law.

The opinion on this point concludes "that the *existence* of a publick road or causeway, forms an exception in favour of which all opinions may be reconciled;" but the authority says no such thing: the authority says, that the exception is formed by the road or cause-way being the *boundary*; not by its *existence*—an hundred roads and as many cause-ways might *exist*, yet if they were not the boundaries of the land, the alluvion would belong to the owner of the original soil.

Yet this is a fair specimen of the reasoning by which the government of the United States is gratuitously invited to harrass individuals with suits, and snatch their only support from the widow and the orphan.*

* A large proportion of the batture was purchased by Mr. Delabigarre, and is now the property of his widow and infant children.

I might perhaps be excused from producing further authorities to show how untenable the ground is, on which the defendants have sheltered themselves under the French laws, even supposing them the guide of our decision. Take, however, in addition, the following respectable authorities :—

DENISART, *title* ALLUVION, *vol.* 1, *page* 74.—" 1. L'ALLUVION est une accroisement qui se fait insensiblement, et peu-à-peu sur les rivages de la mer, des fleuves et des riéières par les terres que l'eau y apporte.

" 2. Lorsque par *alluvion*, un héritage se trouve insensiblement accru, et plus étendu qu'il ne l'étoit, l'accroisement appartient au propriétaire, et celui dont l'héritage est diminue par cette voie, ne peut pas revendiquer ce qui s'en manque.

" Cette maxime qui est puisée dans le droit Romain, A LIEU DANS TOUTE LA FRANCE, excepté en *Franche-Comt.* On y dit communément au contraire, que la riviére, du Doux *n'ote ni ne baille.* Ainsi *l'alluvion* n'est point dans le cours de cette rivière, un moyen d'acquérir. Voyez la remarque de Dumoulin.

" Il faut encore excepter la rivière de Feère, qui, suivant une coutume locale d'Auvergne, *n'ote ni nè baille*, c'est-à-dire, que *lorsqu' elle prend d'anciennes possessions par inondations ou autrement, petit-a petit, de-ca on de-la l'ean, il est permis a celui qui perd, de suivre sa possession et de la revendiquer.*

" 3. L'augmentation qui arrive dans un héritage par *alluvion*, est une seule et même chose avec l'héritage accru : [*fundus fundo accrescit, sicut portio portioni ;*] il en prend toutes les qualitées accidentelles de fief et de roture, de propre et d'acquêt ; il est sujet aux mêmes charges, fussentelles d'usufruit et de substitution.

" 4. Il n'en est pas de même d'un accroissement subit, occasionné par un débordement, ou par quelqu'autre cas fortuit : la portion de ce terrien pourroit en ce cas être réclamée par le propriétaire. Voyez le coutume de Bar.

" 5. La maxime est d'ailleurs afferme par l'arrét rendu au rapport de M. l'abbé de Vienne, en la quatrième chambre

des enquêtes, le 15 Avril 1744, entre le marquis de Bouzols et M. de Chamflour, conseiller en la cour des aides de Clemont, rapporté par Guyot, traité des fiefs, tom. 6, chapitre *des rivieres*, page 673, n. 10; [et par arrêt du Mercredi 22 Février 1769, rendu en la grande-chambre, conformément aux conclusions de M. Seguir, avocat-général, la même chose a été jugée. La sentence qui avoit ordonné une visite des lieux, a été infirmée; et il a été ordonné qui par enquête respective, il seroit vérifié si le changement du cours de l'eau, sur la rivages de la mer, avoit été subit ou insensible. Me. Lochard pladoit pour le chopitre de Lucon, et Me. Caillou pour le sieur de Champagné.]

" 6. Bourjon prétend que ce qui accroit par *alluvion* appartient au seigneur haut justicier; mais ni son opinion, ni l'avis des auteurs qu'il cité ne sont suivis dans l'usage. Voyez la contume de Normandie, art. 195, l'article 268 de celle d'Auverre, l'article 155 de celle de Sens, et celle de Metz tit. 12, art. 28.

" 7. Les attérissements formés subitement dans la mer ou dans les fleuves et rivières navigables, apportiennent au roi par le seul droit de sa souveraineté. Voyez la dêclaration du moi d'Avril 1683, et M. le Bret, de la souveraineté, liv. 2. chapitre 16; et les edits des mois de Décembre 1693, et Février 1710, concernant les attérissemens, isles et islots. On trouve ce doux édits dans le receuil de Néron, tome 2."

RENUSSON TRAITE' DES PROPRES, *p.* 39.

".It often happens that an inheritance which is bounded by *a stream or navigable river*, is augmented or diminished by the stream which forsakes its ancient bed, and makes for itself another. This augmentation or diminution, is a profit or loss to him *who has the adjoining inheritance*. The increase is an accessory, which belongs of common right, to the proprietors of the soil which is contiguous to it." *Ins. lib.* 2, *de rerum div.* &c. &c.

" This increase can have no quality different from that of the principal inheritance, according to Argentée on the custom of Bretagne, and Dumoulin on the ancient custom of

Paris, who says *the increase of alluvion is acquired to us, in the same right by which the original soil belonged to us; nor is this increase considered as a new field, but as a part of the first.*

"But what shall we say of an island formed in a river, opposite to our soil, which is separate property. It would seem that an island being a thing separate from the inheritance which borders on the river, there would be no right of accession, and that the island ought not to be considered as of the same quality: nevertheless we may pronounce that IT IS OF THE SAME NATURE WITH THE INHERITANCE, *quia eodem jure alluviones accedit.* Common right requires that an island which arises in a river, should belong to the proprietor of the adjacent soil; or if it arises in the midst of a river, that it should belong in common to those who own the soil on the opposite sides, &c. 1 *Domat*, 268.

"The proprietor of an estate acquires the possession of whatever may be added to it by nature, which augments the land, and becomes as it were an accession thereto. Thus the insensible increase which may be gained by an estate joining to a river, by the operation of the water, is an acquisition gained by the proprietor of the estate.

"But if an inundation or the sudden change of the bed of the river, divides an inheritance, and joins it to another, the property of this part remains in its ancient owner."

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Ferriere's Commentaries on the Institutes, Book 2, *Title* 1.

TEXT.

§ 20. *De Alluvione*—"Moreover, whatever a *navigable river (fleuve)* adds by alluvion to our estate, is by the law of nature our own. By alluvion we mean an increase so imperceptible, that it is impossible to know how great an augmentation has been received at each instant of time."

FRENCH LAW.

"*The disposition of this section is observed among us.*"

TEXT.

§ 21—" But if by the impetuosity of its current, a river has carried off a part of your land, and joined it to that of your neighbour, this part does not cease to belong to you: however, if it has remained a long time joined to the inheritance of your neighbour, and the trees which it has carried with it have taken root, the soil shall belong to him."

FRENCH LAW.

" The provisions of this section take place in *France*, with this difference, nevertheless, that when the accessions which are thus *suddenly made*, are very considerable, and that they have remained joined to an inheritance for a long period of time without being claimed, it is said they ought to belong to the *kings*, or to the *superiour lords*, as a kind of *vacant possession*, or a derelict which appears conformable to the royal ordinances by which the *islands* and *atterissements* which are formed in great rivers belong to the king."

A most persuasive, if not a conclusive argument that the law of *France* is as I have stated, may be drawn from the following circumstances and opinions. When the first consul undertook the great task of giving a general system of jurisprudence to *France*, he caused his digest or *projet de code* to be prepared by the first lawyers in the country—this was printed, and a copy sent to every superiour tribunal in the republick for their consideration; and after a proper period it was returned with such remarks and amendments as had occurred to the different judges, that the legislature might, prior to its final adoption, have the benefit of the best legal advice on its different provisions.

The articles in this *projet* relating to the subject under discussion, are contained in the 2d sect. 2d title of the 2d book, and are as follows:

" 15.* The collection of earth (attérissements) and accessions which are annexed successively and imperceptibly to

* " Les attérissemens et accroissemens qui se forment succes-

the land bordering on a river or navigable stream, are called *alluvion.* Alluvion belongs to the riparious proprietor, when it takes place on a river, whether it be navigable or capable of carrying rafts or not—under the condition in the first case leaving the path prescribed by the regulations.

"16. The rule is the same with respect to the running water, which retires insensibly from one of its banks, and encroaches on the other; the proprietor of the shore which is left dry, shall benefit by the alluvion—and the proprietor of the opposite shore shall not be permitted to reclaim the land which he has lost."

If this part of the project had made any change in the ancient laws of the country, some of the learned men to whom it was submitted, would have taken notice of the novelty, with marks either of censure or approbation—but we find them all either passing over the articles as merely declaratory of the old law, or else expressly acknowledging them as such, and stigmatizing the doctrine now contended for by Mr. *Derbigny* as an oppressive and ineffectual attempt to pervert the laws of the kingdom.

To begin with the tribunal of *Paris*, they set out with this general observation on the part of the code containing the provisions—"The rules proposed" (they say) "on the subject, are in general conformable to what has *always been practised*, and give occasion to but very few observations," and among those few are none on the subject of alluvion.

sivement et imperceptiblement aux fonds riverains d'une rivière, s'appellant *alluvion.*

"L'alluvion profite au propriétaire riverain, soit qu'il s'agisse d'un fleuve, ou d'une rivière navigable, flottable ou non; à la charge, dans le premier cas, de laisser le marche-pied prescrit par les réglemens.

"16. Il en est de même des relais que forme l'eau courante qui se retire insensiblement de l'une de ses rives en se portant sur l'autre; le proprietaire de la rive découverte profite de l'alluvion, sans que le riverain du coté opposé y puisse venir reclamer le terrain qu'il a perdu.

Ce droit n'a pas lieu à l'egard des relais de la mer.

The tribunals of *Nanci*, *Nimes*, *Orleans*, *Rions*, *Liege*, *Metz*, *Montpelier*, *Agen*, *Aix*, *Grenoble*, *Poictiers*, *Rennes*, and others, pass over these provisions as matters of course, or recommend a slight alteration, to prevent disputes between the proprietors of lakes and the adjoining land.

The tribunal of *Rouen* has these strong expressions, speaking of the 19th article in the project of code, which declares islands in the middle of navigable rivers to belong to the nation, they say:

"The Roman law gave to the adjoining proprietors the islands which were formed in navigable rivers, a disposition which appears more equitable than this article of the code, and *more worthy of a great nation*, whose true interest is not to acquire property to the injury of individuals.

"The edicts and declarations of the former kings which claimed for the domain the islands of navigable rivers and *fleuves* (primary rivers) were only exchequer laws; these laws were founded on the false pretext that the inlands were an appendage of the river, which they considered as belonging to the king. But,

"1. The river itself is not a national domain, but a thing of which the publick have the use, it belongs to the nation, not in full property, but as an appendage of its sovereignty.

"2. The islands are not appendages to the waters of the river, but to the bed of the river: the right of individuals to which is acknowledged when the river abandons it.

"An island cannot be formed without increasing the width of the river at the expense of the adjoining land—and the damages to which the proprietors of these lands are exposed, should entitle them to the islands, as an indemnity for the risks and losses they incur.

"The principle which we propose would not at all invade the publick right to the islands, which the nation possesses, or for which they have positive titles—but it would tranquillize those individuals, who FOR AGES have possessed islands in the rivers, as the true owners—and whom the agents of the

domain HAVE ALWAYS VEXED WITHOUT HAVING EVER SUCCEEDED IN DESPOILING THEM OF THEIR ESTATES."*

Here we have the positive declaration of a learned tribunal speaking to the collective legal wisdom of the nation, and in the performance of a solemn and disinterested office, deciding that the edicts did not extend to *alluvions*, but only to islands in navigable rivers.

That even in that stong case, the edicts were considered as EXCHEQUER LAWS, (lois bursales) founded on FALSE PRETEXTS, which were NEVER EXECUTED, served only for the purposes of VEXATION, and that the proprietors have IN SPITE OF THEM, kept possession of their islands FOR AGES.

The tribunal of Toulouse recommends the same provisions in favour of isles and islands—And that of Lyons expressly

* "La loi Romaine au digeste *de acquirendo rerum dominio*, attribuaient aux propriétaires voisins, les iles qui se formaient dans les fleuves—disposition qui parait plus equitable que cet article du code, et plus digne d'une grande nation, dont le veritable intérêt n'est point d'acquérir des propriétés nouvelles par preference aux particuliers.

"Les edits et déclarations des ci-devant rois qu'attribuaient au domaine les iles des fleuves et rivières navigables, n'etoient que des loix bursales. Ces lois se fondaient sur le faux prétexte que ces iles étaient un accessoire du fleuve qu'on regardoit comme appartenant au roi.

"1. Le fleuve lui même n'est point un domaine national, mais une chose publique; il appartient à la nation non a titre de propriété, mais à titre de souverainete.

2. L'ile n'est pas un accession des eaux du fleuve, mais bien du lit du fleuve, sur le quel les droits des particuliers ne sont pas me connus lorque le fleuve l'abandonne.

3. Il ne peut guère se former une ile sans que le fleuve s'olargesse aux Dépens des terrain voisins; et le ravage aux quels sont exposés les propriétaires des ce terrains, doivent leur faire obtenir les iles qui se forment dans le fleuve, comme une juste indemnité des risque q'uils courent et des pertes qu'ils épronvent.

Le principe que nous proposons ne porteroit aucune atteinte à la propriete dominiale des iles que la nation possede ou sur les quelles elle à des titres d'engagement; mais il servirait à tranquilliser les particuliers qui depuis des siécles possedent des iles dans les fleuves comme veritables propriétaires, et que les agents du domaine ont toujours vexés, sans pourtant parvenir à les dépoullier de leur fonds.—*Observations du tribunal d'Appel de Rouen, p.* 15.

declares that the claims of the crown to the "*Islands in navigable Rivers*," never considering the edicts as even claiming alluvions, was founded on no other law than that of force, (le droit du plus fort.)

Portalis, in his preliminary discourse to this part of the Code, repeats the same ideas; asserts that the language of the Code on the subject of alluvion, is that of the ancient law, as SETTLED LONG PRIOR TO THE REVOLUTION; refers the claims of the crown to obsolete feudal principles, and finally declares that the edicts were only fiscal attempts to oppress the subject.

.....

I should not have multiplied these authorities, had it not have been for the respect I bear to that of *Pothier*. None of those I have cited, at all accord with the doctrine the defendants suppose him to maintain. Many of them are posterior to his work, and of those none mention his opinion as differing from their own. This notice his acknowledged respectability would have required, had they thought this difference existed. I think, therefore, I may fairly infer from their silence, that they have construed the passage cited in the way that I have done: of course that there is a perfect coincidence between these eminent writers on this point, and that the laws of France, except in the particular enumerated districts, is conformable to the Roman and the Spanish codes.

But as I am determined not to leave my adversaries a single recess in which they can hide a doubt, or from which they can bring out an argument, I will suppose that I have wholly failed in this division of my cause; that the laws of *France* are to govern, and that they are as laid down by the defendants; yet the alluvions of the *Mississippi* have not since the first settlement, belonged to the crown of *France*.

FIRST. Because, as I have shown, we hold the lands in *franc aleu* or allodial tenure.

SECOND. Because if the king of *France* had this right, he

has expressly *renounced it*, and the authority in *Pothier*, as well as the edicts, admit that a grant of alluvion shall be good against the crown.

In *September*, 1712, *Louisiana* was first granted, by the crown, to Mr. *Crozat*. I have never seen a copy of this grant, but there is reason to believe from a subsequent recital, that it was extremely liberal. This however is immaterial, for having surrendered his grant, the same country was conceded to the West-India company, by letters patent, dated in *August*, 1717, the Vth article whereof is in the following words: "In order to provide the said West-India company with the means of making a permanent establishment, and to execute all the plans they may form, we have given, granted and conceded, and by these presents do give, grant and concede to them, forever, all the lands, coasts, ports, havens and islands which form our province of *Louisiana*, as well, and with the same extent as we had granted it to Mr. *Crozat*, by our letters patent, dated 14th *September*, 1712, to enjoy the same in full property, *lordship and justice, reserving to ourselves, but only fealty and homage*, which the said company shall render to us and the kings our successors, with a crown of gold of the weight of twenty marks."

By the 8th article the company are expressly authorized to grant lands in *franc aleu* or allodial tenure.

Under this ample grant, all the titles of the *Jesuits* were derived,* and after reading it, I fancy nothing more will be said of the *royal right* to the alluvions of the *Mississippi*, under the West-India company.

Again, by the fifteenth article of the charter, the custom of *Paris* is expressly introduced and established *unchangeably* as the fundamental law of the territory. Whatever then may the laws of the other part of the *French* dominions be, unless alluvions can be shown to be the property of the crown by the *Custom of Paris*, the argument with respect to

* The title to the Jesuits is dated in 1726 near six years before the patent to the company was resumed by the crown.

this property is at an end. This has not been attempted; for it was known that it could not have been done with success. As however, I have not the same reasons to shrink from this research, I will refer to *Ferriere's* folio edition of the custom of *Paris*, and its commentary, 4 vol. p. 917, nos. 37, 38, 32. "Alluvion is an imperceptible increase to an inheritance, produced insensibly diminishing the neighboring lands; for the augmentation cannot otherwise take place. This increase is so intimately united to the inheritance, that it assumes all its qualities, and consequently becomes separate property, if the inheritance were so. According to Demoulin, on the first article of this custom, gloss. 5, nos. 115, 116, where he says, *incrementum alluvionis nobis adquiretur, eo jure quo ager augmentatus primum ad nos pertinebat, nec illud incrementum sentitur novus ager sed pars primi.*

"It would not be the same case, if the river should add to the inheritance of an individual, an island or an entire parcel of soil, although it should be united to the inheritance, THIS WOULD BE CONSIDERED AS A PART OF THIS INHERITANCE; but not with the quality of separate property." See also the same work, vol. 1, p. 886.

These authorities prove much more than is necessary for my purpose, not only that alluvions strictly so called, which are made imperceptibly, belong to the proprietor of the soil to which it is attached; but that the *Custom of Paris*, in conformity with the *Roman* and the *Spanish* laws, give to him the islands and portions of land formed in a river or on its banks, by a change of its course, or other sudden accident.

But the custom of *Paris*, as I have shown, was declared by the charter, and I might have added by an express edict of "Louis the fourteenth," to be the law of this colony.

So that I think I have fully demonstrated that even if the general law of *France* would have given this kind of property to the king, yet on the *Mississippi*, it belonged to the adjoining proprietor, as well by the laws of the province as by the actual grant of the king.

Before I conclude I ought perhaps to make some observations on the relinquishment, alleged to have been made by

Mr. *Gravier*, of his title, and the notorious acts of ownership which are stated to have been done by the *Spanish* government. Let it be remembered that proof of these very acts was produced by the corporation of the city as evidence of *their Title* and that it has not been until after they despair of making any title in themselves, that they now appropriate the same evidence to make out one for the United States.—What reliance can the United States have on such accommodating proof, that will fit any claim and serve any occasion? That first used to establish the interests of the corporation is now set to work as the engine of their malice and resentment. But it is not from its general character that I would stigmatize it. Let us do justice and examine it fairly.—What are these proofs?

1. *Gravier* abandoned his right to the publick.
2. Governor *Carondelet* ordered the sheds on the batture to be pulled down.
3. The cabildo refused permission to erect any buildings thereon.
4. The inhabitants of the town dug earth there, and the publick used the batture as a landing.
5. The auditor gave it as his opinion that the ground between high and low water mark belonged to the publick.
1. *Gravier* abandoned the batture to the publick.

A point materially relied on both in the case and in Mr. Derbigny's opinion, to show this relinquishment of *Gravier* is, that by depositing a plan, in which this part of his farm was not laid out into lots, he had virtually declared that it was a common for the publick—the case indeed goes further, and says that in this plan the batture *was marked as a space which is to remain free and not subject to be built on.* This in the literal acceptation of the terms is UNTRUE, for there is *no such mark* on the plan, and therefore I presume Mr. *Moreau*, who drew the case, meant that it should be understood with the qualification that follows, that it was marked as free only because it was not divided into lots, that is to say, because it was *not marked at all.* The same wise reasoning would vest all

the rear as well as the front part of *Gravier's* farm in the publick, because the line of lots occupied but a small part of the farm fronting on the road. But it is said Mr. *Gravier* declared that he had abandoned his right to the publick—If the evidence of these declarations had been as full as certain and circumstantial as it is contradictory, vague, and frivolous, yet without writing and recording it would give no title to the *United States*, according to the laws of the country at the time it was said to have been made, [see the discussion of this point in the report of the case.] But the proof itself is wholly uncertain—one witness says it was to *the publick*, another to the inhabitants of the town, and a third to those of the suburb—none of them pretend to relate with precision the time, conditions or consideration of the supposed abandonment. But can it possibly escape the attention of the most superficial reasoner, that this branch of the argument is directly at war with all the others, and that the very allegation of it is an express admission of our title? The same may be said of the *Baron de Carondelet's* and governor *Gayosa's* orders to repair the roads by the publick convicts—for it was in both instances said to be founded on this supposed abandonment, of which both the governors know so little that they always considered *Gravier* as the owner of the land, and sent the order for repairs in the first place to him. These very facts too stated and relied on by those who advocate the title of the *United States*—completely contradict the unblushing assertion that "*the batture never ceased to be part of the sovereign's domain.*" If this was the case, why did *Carondelet* and *Gayosa* both send to *Gravier* to repair the roads, and why according to Mr. *Derbigny's* showing, did they undertake the task only when informed that *Gravier* had abandoned his right.

2, 3, 4, and 5. Governor *Carondelet* ordered the sheds built on the batture to be pulled down—The cabildo refused permission to build others—the auditor gave it as his opinion that the publick had a right to the land, and they actually used it for a publick landing.

There is proof that the demolition of the buildings arose from their being in the range of the fort guns. *See the deposition of Mr. Pedesclaux*—but admitting these facts to be proved in the fullest manner, no other inference can be drawn from them, than one incident to the nature of the property.—By the civil law, the publick have a right to the use of the banks of navigable rivers, though the property remains in the owner of the adjacent soil; on the *Mississippi*, by usage and the nature of the ground, the bank comprehended the levee, and all the space between it and the river. When the river encroaches, the levee is brought nearer in; when it retires, or forms an alluvion, the proprietor extends his levee, encloses the new made ground, and leaves the publick the enjoyment of the new bank and that part lying outside of it, for the purposes of navigation—On this space it is unlawful for the proprietor to erett any thing that may interfere with the use secured to the publick.—The governor therefore would have had a right to order the sheds to be demolished, because they must have interfered with the publick use—The cabildo, who were the governor's council, were right in refusing permission to erect any buildings—the auditor was perfectly correct in the opinion he is said to have given, and the publick had a right to the free use of the property for the purposes of navigation. They were all right *then*, because *Gravier* had not enclosed the alluvion land, and by making a new levee and tow path on the bank of the new made ground, given the publick the accommodation the law required—But they would have been perfectly wrong if *Gravier* had at that time offered as the proprietors do now, to reclaim the land from the inundation of the river, and by erecting a tow path, a levee, and commodious wharves, give the publick ten-fold the convenience to which they were entitled by law. Thus we see, that all the material facts proved by the advocates for the title of the *United States*, confirm and strengthen that which I assert to be in *Gravier* and those who claim under him, and I may, without flattering myself, believe that I have fully established the following points:

I. That the *Jesuits'* plantation was like all the others on the river, bounded in front by the river itself.

II. That no alteration took place in the front boundary of any of the subdivisions of that plantation by the sales of 1763.

III. That the alluvion formed in front of that plantation, belongs to the proprietors of the several subdivisions:

1. By the general law of *France.*
2. By that of *Spain.*
3. By the particular laws of this province while under the *French* government.
4. By virtue of the allodial tenure by which they were held.

IV. That the alleged relinquishment by *Gravier,* is too uncertain to give title: and if proved, only serves to destroy the other arguments used by the advocates of the *United States.*

V. That the acts relied on as possessory by the government, are perfectly consistent with my title, and rather serve to strengthen than destroy it.

The view I proposed to take of the arguments urged in favour of the claim of the *United States* to this property is now finished. Let it be read with attention. Let those whose duty or inclination calls them to decide on these pretensions, examine carefully the principles and study the authorities cited to show that this was never of right a part of the sovereign's demesne. Let this be done without prejudice or partiality, and though all my prospects of fortune are involved in the decision, I shall await it without anxiety. I have hesitated long before I resolved on its publication; but the unwearied pains which are daily taken to slander my title, and render my property useless, require that I should take some steps to counteract them.

This must be my apology for discussing a legal question before the publick.

EDWARD LIVINGSTON.

December 10, 1807.

NOTES.

NOTE A.

L'AN mil sept cent soixante trois, le jour du mois de Juillet, huit heures du matin, en vertu d'l'arrêt du conseil supérieure de la province de la Louisiane, en date du neuf du présent mois, rendu sur la requête de Monsieur La Fréniere procureur général du roi, portant et ordonnant que tois les biens meubles et immeubles appartenant aux ci-devant soi-disant Jesuites, seront judiciarement vendus pardevant Monsieur Foucault, contrôleur de la marine et second juge au conseil supérieure de cette province, commissaire nommée en cette partie, et en présence de mon dit sieur le procureur général du roi, pour les neniers en provenants être mis sous la main du roi. En conséquence de quoi, nous Denis Nicolas Foucault, contrôler de la marine et second juge au conseil supérieure de la province de la Louisiane, commissaire nommé en cette partie, en présence de Monsieur le procureur général du roi, et acccompagné du greffier et de l'huissier dudit conseil, nous sommes transportés à la barre de la cour à l'effet de procéder pour le première fois à recevoir les criés et enchères pour parvenir à la vente et adjudication au plus offrant et dernier enchérisseur, d'une terre et habitation située près de cette ville, appartenante aux ci-devant soi-disant Jésuites, où étant, vû le procès-verbal des publications et affiches publiées et apposées en conséquence dans tous les lieux et endroits ordinaires et accoutumés de cette ville de la Nouvelle-Orleans, par Marin Lenormand, huissier, en date de dix-sept dudit présent mois, et s'y étant trouvé nombre d'enchérisseurs, nous avons fait publier et proclamer à haute et intelligible voix par l'huissier crieur que l'on allait tout présentement procéder pour la première fois à recevoir les criées et enchères pour parvenir à la vente et adjudication au plus offrent et dernier enchérisseur d'une terre et habitation No. 1er. *ayant sept arpents de face* joignant aux fortifications de cette ville, courante de soixante neuf dégrés du nord à l'ouest, la limite au-dessus des dits sept arpents, courant soixante-quatre dégrés quarante huit minutes trente-neuf secondes, vingt-deux toises et demie du nord à l'ouest, sur cinquante arpents de profounder, ensemble avec tous les bâtimens qui sont dessus, consistant en deux maisons principales, cuisine, magazins colombiers, briqueterie, indigoterie, cabanes à nègres et clôtures, circonstances et dependances, sans en rien reserver ni retenir, tel que le tout se consiste et comporte, attenant d'un coté à cette ville et de l'autre à la terre No. 2, faisant partie de la terre appartenante aux dits soidisant Jésuites; aux clauses et conditions par l'adjudicataire de payer le prix de son

adjudication dans huit mois du jour d'icelle, en donnant bonne et suffisante caution, et de payer comptant tous les frais faits pour parvenir à la dite adjudication, entres les mains du greffier avant d'être mis en possession ; et après avoir attendu jusqu' à dix heures sonnées sans que personne se soit présenté pour faire son dite enchère, nous commissaire sous dit et soussigné, du consentement de mon dit sieur procureur général du roi, avons ordonnés et ordonnons que nouvelles affichesseront publiés et apposées dans tous les lieux et endroits ordinaires et accoutumés de cette ville, le Dimanche, trente un du présent mois, pour en venir à des nouvelles criées et enchères le Mercredi suivant, troisième du mois d'Aôut prochaine, huit heures du matin ; auquel jour toutes personnes seront reçues à y faire leurs enchères au susdites clauses et conditions et ont signés le susdits jour et an.

(Signé) LA FRENIERE.
FOUCAULT.

Certifié conforme à la minute, folio 221 d'une liasse intitulée *Proces des Jesuites*, et déposé en ce moment au greffe du conseil de ville.

Nlle.-Orléans le 10 Octobre, 1807.

Mce. BOURGEOIS, *Sec.-Greffier.*

.....

In the year 1763, the day of the month of July, at eight in the morning, by virtue of a decree of the Superiour Council of the Province of Louisiana, dated the ninth of the present month, pronounced at the instance of Mr. La Freniere, Procureur General of the King, declaring and ordering that *all the estate real and personal, of the persons heretofore stiling themselves Jesuits, should be Judicially sold* before Mr. Foucalt, Comptroller of the Marine and Second Judge of the Superiour Council of this Province, Commissioner named in this respect, and also in the presence of the said Procureur General, in order that the proceeds may be placed at the disposition of the king.—In consequence whereof we, Dennis Nicholas Foucault, comptroller, &c. in the presence of, &c. and accompanied by, &c. went to the bar of the court, for the purpose of proceeding, for the first time, to the sale at auction of a parcel of land and plantation, situated near this city, heretofore belonging to the said persons calling themselves Jesuits, where being arrived, and having seen the advertisements, &c. we caused to be published and proclaimed with a loud and intelligible voice, by the cryer, that we were about to proceed, for the first time, to receive the bids and offers, in order to make sale, to the highest bidders, of a tract of land and plantation, No. 1, having seven acres in front, adjoining the fortifications of this city, running sixty-nine degrees from the north to the west, the upper line running north sixty-

four degrees forty minutes and thirty-nine seconds west, by fifty acres in depth, together with all the buildings which are thereon, consisting of two principal houses, a kitchen, store, pigeon-house, brick-kiln, indigo-works, negro huts and enclosures, *with all its circumstances and dependencies, without reserving or retaining any part thereof of whatever parts the whole may be composed, and as it now is*, [tel que le tout se consiste et comporte] bounded on one side by the city and on the other by the lot No. 2, being a part of the estate belonging to the persons calling themselves Jesuits, &c.

TRANSLATION.

PROCEEDING OF SALE OF THE JESUITS.

In the year 1763, on the 14th day of July in the same year, we, the undersigned councillor of the king, inspector of the roads, and surveyor general of the province of Louisiana, do declare to all whom it may concern, that by virtue of the orders of Mr. Dabbadie, commissary general of the navy, Ordonnateur of the said province, rendered the thirteenth of the present month, by which we were directed to transport ourselves on the habitation of the persons entitling themselves Jesuits, situated above and bordering on the *glacis* of the fortifications of the city of New-Orleans, there to examine the titles and papers relative to the possessions of the aforesaid persons and to survey the lands, which we found ought to contain thirty-two *arpents* of front on the river, "*de face sur la fleuve St. Louis*," according to the said titles, papers, plans and minutes, "*proces verbeaux*" of survey, herein after mentioned, made by the late Mr. Broutin, the former engineer, then charged with the surveys of the colony. To wit, twenty arpents of front, measured on the perpendicular of fifty-four degrees from north to west, running to the depth of fifty arpents, which shall, however, be reduced to forty arpents in case it should anticipate on the lands not yet conceded or to be conceded—which lands M. de Bienville, the former commandant and governor of the said province, has sold on those conditions and in allodium, [*franc aleu*] to the persons calling themselves Jesuits, by an act passed on the 11th April, 1726, in the presence of André Chavre, notary, *au Chatelet de Paris*.

Also, five arpents in front, "*en face*" measured on a straight and oblique line, running along the said river, and above and bordering on the twenty mentioned above, sold to them with the same depth, with the same rights and privileges as the preceding, by the ate Mr. de Noyau, lieutenant in the service of the king, attorney in fact for the said Mr. de Bienville, by a private act, dated January the 22d, 1728.

Also, seven arpents of front, seven arpents measured, as adjoining, and above, the five preceding arpents and with the same depth, which the said Jesuits had purchased from Mr. Breton, comptroller of the navy, and first councillor of the superiour council of this province, by an act passed on the of December, 1743, forming together with the preceding acquisition the totality of thirty-two arpents of front, mentioned by the said Broutin, in the proces verbal of the 30th December, 1728, of the 19th January, 1736, and of the 18th and 23d Dec. 1745.

Conformably to the different operations delineated on the plan made by him on the 19th of June, 1736, and the 23d December, 1745, &c.

P: 148—"In the year one thousand seven hundred and sixty-three, the 24th November last, we, councillor of the king, inspector of roads, and surveyor of the province of Louisiana, do declare, that in virtue of orders given by the commander general of the said province, we went with Mr. Pigeor, L. L. on the lands which had belonged to the Jesuits, situated above and bordering on the fortifications—for the purpose, at the request of Mr. La Tussiere, to divide the thirty-two arpents of land mentioned in our proces verbal of the 22d of July last, the judicial sale of which took place on the following, at the greffe of this city, to wit:

"Seven arpents of front on fifty of depth for the first lot, bordering on the glacis of the said fortification, adjudged the aforesaid day to Mr. Pradel, lieutenant in the navy, commanding the king's ship La Solomon, then in this harbour.

"2. Five arpents of front, with the same depth, for the second lot, situated above the first, and bordering on the same, adjudged the same day to Mr. Larrivèe, merchant.

"Five arpents of front, with the same depth, for the third lot above, and bordering the second, adjudged the same day to Mr. Grenier, merchant.

"Five arpents in front, by the same depth, for the fourth lot, adjoining to and above the third, adjudged the same day to Mr. Bonrepos, an ancient officer of infantry.

"Five arpents in front, on the same depth, for the fifth lot, adjoining to and above the fourth, adjudged to Mr. Sollet, citizen of this town.

"Five arpents in front, by the same depth, for the sixth and last lot, adjoining to and above the fifth, adjudged to Messrs. Durand, Brothers, merchants. All purchasers summoned to be present, at the operation of surveying, distribution and delivery of the said parcels of land—At which they were all present either in person or by their attornies, viz. Mr. Amlet, knight of St. Louis, engineer in chief of the king, acting for Mr. Pradel the son, purchaser of the second lot, late belonging to Mr. Larrivèe, after the said adjudication, as appears by the act passed between

them dated the Mr. Lamotte, acting for Mr. Grinier, absent."

[Then follows the proces verbal of the placing of the posts to show the direction of the literal line next the city, and the record then proceeds.]

"On which line, and at the point D. we have, on the 28th of the present month, replaced our instrument six toises above the said point A, *to ascertain with precision the extent of front of those lands on the river St. Louis*, the distribution of which at right angles could not take place, according to the dispositions of the first plan, which circumstance compelled us to make new ones, still relative, however, to those mentioned in our proces verbal of the 22d July last, by two straight lines running along the river, the first of which DE, formed an angle of 111 degrees with that of the said boundary of sixty degrees."

The record then sets forth the geometrical operations for dividing the six several lots, and that after having measured off the first and second lots, which then both belonged to Mr. Pradel, "*they opened an angle of* 117 *deg. with the said line of conduct*" (ligne de conduite) to direct the limits between this habitation (now that of Gravier) and No. 3."

After describing minutely the operation of division, it concludes thus, "And as there remains on the upper end of the land late belonging to the Jesuits, according to the plan of our operations, a tongue of land forming the figure of an isoseles triangle, comprehended between the line of boundary GLL. and the dotted line G. K. it shall remain between these limits to be used as need may require hereafter.

"In testimony whereof we have agreed to and signed the present proces verbal with the said sr. Pigeon, and the said purchasers or their attorneys afore named in the former part of this record, to have the proper effect, and serve as a field book [papier terrier] annexed to the plan of survey, and of the distribution of the said land into the six lots above mentioned. Done at New-Orleans, the 22d of the month of December, in the year 1763.

"Signed,

"*Olivier Devezin, Pijon, Thos. Saulet, Le Chevr. De Beanrepos, Amelot, Villars, A. Faures, J. Lamothe, Durand Freres.*"

"I require in the name of the king, that the present proces verbal should be homologated; that it may have its full and entire effect; that the decree which may be pronounced may serve as letters of possession irrevocable and incontestible to the purchasers of the six lots of the land belonging to the former company of Jesuits. New-Orleans, 24th April, 1764.

"*Signed* LA FRENIERE."

"*The Superiour Council* of the province of Louisiana having seen the proces verbal of the division of the lands of the ci-devant

company calling themselves Jesuits, made out by Mr. Oliver Devezin, and the conclusions of the procureur general of the king, the council hath ordered, and hereby doth order, that the said proces verbal shall be executed according to its form and tenor, and shall remain homologated as is above stated.

" Signed,

" *D'Abbadie, Zuchel, De Kernion Aubry, Faucault, Marrenel, Murhuise, and De Amney.*"

NOTE B.

MONSIEUR,

ETANT de la dernier conséquence que la levée de vos terres soit dans le mellieur état, vous prendres des mésures avec Monsieur de la Barre, régidor perpétualle, alguazil mayor, pour récommoder la dite levée, à commencer de l'endroit où mon dit Sr. de la Barre vous indiquera.

Votre exactitude reconnú ne me laisse pas la moindre doute du zèle avec lequel vous remplirez cette ordre.

Je suis, Monsieur,

Votre serviteur,

LE BARON DE CARONDELET.

Nlle.-Orléans, 10 Mars, 1794.

A Mons. Gravier.

.....

TRANSLATION.

SIR,

IT being of the greatest consequence that the levee of your land should be in the best condition, you will please to take measures with M. de la Barre, perpetual register and alguazil mayor, to repair the said levee, beginning at the place which the said Mr. de la Barre will point out to you.

Your known punctuality leaves me no doubt of the zeal with which you will obey this order.

I am, sir, your servant,

THE BARON DE CARONDELET.

New-Orleans, 10th March, 1794.

To Mr. Gravier.

NOTE C.

Adjudication de six arpents de terre appartenante aux ci-devant soi-disant Jesuites.

A dix heures du matin.

L'AN mil sept cent soixante trois, le quatrieme jour du mois d'Aôut, dix heures du matin, en vertu de l'arrêt du conseil supérieur de la province de la Louisiane, en date de neuf Juillet dernier, rendu sur la requête de M. La Frenière, procureur général du roi, portant et ordonnant que tous les biens, meubles et immeubles, appartenant aux ci-devant soi-disant Jésuites, seront judiciarement vendus par devant Monsieur Foucault, contrôleur de la marine, et second juge au conseil supérieur de cette province, commissaire nommé en cette partie, et en présence de mon dit sieur le procureur général du roi, pour les deniers en provenante être mis sous la mains du roi: en conséquence de quoi, nous Denis Nicolas Foucault, contrôleur de la marine et second juge au conseil supérieure de la province de la Louisiane, commissaire nommé en cette partie, en presence de M. le procureur général du roi, et avec le greffier et l'huissier du dit conseil, nous sommes transportés à la barre de la cour, à l'effet de procéder pour la premier fois à recevoir les criées et enchères pour parvenir à la vente et adjudication au plus offrant et dernier enchérisseur, d'une terre situé de l'autre bord du fleuve, en remontant, distant de cette ville d'une lieue et demie, appartenante aux dits ci-devant soi-disant Jésuites, où ètant, vû le procès verbal des publications et affiches publiées et apposées en conséquence dans tous les lieus et endroits ordinaires et accoutumés de cette ville de la Nouvelle-Orléans, par Marin Lenormand, huissier, en date du vingt-quatre Juillet dernier, et s'y étant trouvé nombre d'enchérisseurs, nous avons faite publier et proclamer à haute et intelligible voix, par l'huissier crieur, que l'on allait tout présentement procéder pour la premier fois à recevoir les criées et enchères pour parvenir à la vente et adjudication au plus offrant et dernier enchérisseur, d'une terre ayant six arpents du terre de face sur la profondeur ordinaire de quarante arpents, la limite courant au nord et sud pliens, située à une lieue et demie de cette ville, d'lautre bord du fleuve, en remontant, circonstances et dépendances, sans en rien reserver ni retenir de fond en comble, tel et ainsi que toute sa poursuite et comporte, attenante d'un côté à l'habitation de la dame veuve Dauphin, et de l'autre côté attenante à une pareille terre appartenante aux dits ci-devant Jésuites, où toute personnes seront reçues à y enchérir aux clauses et conditions par l'adjudicataire, de payer le prix de son adjudication dans huit mois du jour d'icelle, en donnant bonne et suffisante caution, et de payer comptant tous les frais faits pour parvenir à la dite adjudication, entre les mains du greffier ayant d'être mis en possession. Et après avoir attendu

jusqu'à midi sonné, sans que personne se soit présenté pour faire leur dite enchère, nous commissaire sous dit et soussigné, du consentement de mon dit sieur le procureur général du roi, avons ordonné et ordonnons que nouvelles affiches seront publiées et apposées dans tous les lieux ordinaires et accoutumés de cette ville, le Dimanche quatorzième présent mois d'Août, pour en venir au Vendredi dix-neuf dudit mois à dix heures du matin, au quel jour il sera procédé à la deuxième criée et en chère, et où toute personnes seront reçues à y faire leurs dites enchères aux susdites clauses et conditions ; et ont signé les jour, mois et an que dessus.

(Signé) LA FRENIERE.
FOUCAULT.

Certifie conforme à la minutes, folio 213, d'une liasse intitulée *Proces des Jesuites*, et déposée en ce moment au greffe du conseil de ville.

Nlle.-Orléans, le 10 Octobre, 1807.

Mce. BOURGEOISE, *Sec.-Greffier.*

.....

NOTE D.

Je soussigné, arpenteur député pour le comté d'Orléans, certifie n'avoir jamais vû aucune concession depuis plusieurs années que j'exerce dans le comté, aucune concession dis-je, soit Francaise ou Espagnole, située sur le fleuve, qui ne fut bornée par le fleuve, et que toutes ces concessions disent pour exprimer leur étendue " tant *d'arpens de face*," ou " tant *d'arpens de face au fleuve*, et tant de profondeur ;" que la manière de mésurer cette etendue se fait en tirant une parallelle au fleuve. (autant qu'il est possible) ou par une perpendiculaire à l'un des côtés, mais que cette ligne ne designe jamais la limite de la face des habitations ; que les bornes que l'on plantê ne sont jamais au commencement de la ligne de côté que pour désigner la direction que doit avoir cette ligne ou l'air de vent qu'elle doit courir et que jamais on n'a planté des bornes pour marquer la ligne de face. En foi de quoi j'ai delivré le présent certificat.

Nlle.-Orléans, le 10 Décembre, 1807.

LAFON, *Arp. D p.*

.....

I, the subscriber, deputy surveyor of the United States for the county of Orleans, certify that during many years that I have pursued my profession in this country, I have never seen any concession or grant, either French or Spanish, of any lands on the

Mississippi, which was not bounded by the river itself; and that all those concessions or grants, to designate such boundary, use these expressions, "*so many acres in front,*" [de face] or "*so many acres of front to the river,*" [face au fleuve] by so many in depth; that the manner of measuring this extent is done by drawing a parallel as nearly as possible to the river, or by a perpendicular one of the sides, but that this line never designates the front limit of the plantation; that the land marks which are placed in the beginnings of the said lines are intended only to show the directions which those lines ought to have—but that boundaries are never placed to mark the extent of the land towards the river. In witness whereof I have given this certificate. New-Orleans, 12th December, 1807.

(Signed) LAFON, *Dep. Sur.*

Nous soussigné, ci-devant capne. grade. des armés, arpenteur royal et particulier de la province de la Louisine pour S. M. Cath. certifions et declarons, que pendant vingt huit années que nous avons exercé l'emploi d'arpenteur gênl. de cette province, qu'il a toujours été en notre connaissance, que les concessions des terres sur les rives du Mississippi, *prennent leurs faces sur le bord du fleuve meme,* et ou viednent batture les eaux lorsqu'elles sont dans leurs plus grande croissance. Quant aux bornes fixées pour limiter les terreins, *n'etant uniquement destinees qu' a marquer la direction des limits ou airs de vent,* elles ont toujours été plantées à une distance arbitraire, pourvu neanmoins que la voie public qui doit regner sur les rives du Mississippi ne fût point obstruée.

En foi de quoi, j'ai delivre la présente, a la Nll.-Orléans.

CHARLES TRUDEAU.

Le 17 Mars, 1808.

TRANSLATION.

I, the subscriber, heretofore captain by brevet in the royal army, royal surveyor for the province of Louisiana for his Catholick Majesty, do certify and declare, that during twenty-eight years that I have performed the functions of surveyor general of this province, it has always been in my knowledge, that the concessions of lands on the borders of the Mississippi, *have their fronts on the edge of the river itself,* and when its waters are at their greatest height. As to the boundaries placed to limit the lots, *being only destined to mark the direction of the limits, or*

NOTE F.

IN Spain the Justinian code is declared to be the common law of the kingdom, which is to decide in all cases where the edicts are silent. This appears not only from the practice of citing from that code, but among a number of other authorities, by the following: Gom. in leges tauri, page 4, No. 1. "In this kingdom in the decision of cases, first and above all we are to be ruled by the laws of Toro, afterwards in their order by the ordinances and edicts of this kingdom, and the laws of the Partidas, although usages and customs are not prohibited, but afterwards, where these are deficient, we must determine according to the common law of the Roman jurisconsults and the emperors."

By referring therefore to these sources we discover the law of Spain on the subject of alluvion, and I believe, without the slightest ambiguity, establish the following positions:

1. That the bank of a navigable river is, to the water's edge, the private property of the owner of the adjacent soil, though the public are entitled to its use for the purpose of navigation.
2. That the bank comprehends all the land down to the usual summer channel of a river, but is not affected by a periodical or accidental swell of the river.
3. That when the land shall encrease either by alluvion or the retiring of the water, that the space thus gained becomes the property of the proprietor of the original soil, but that the publick retain their use of the new bank for the purposes of navigation.
4. That the interposition of a public road does not form any impediment to the acquisition of this right.
5. That when an alluvion is once formed its future encrease belongs to the proprietor of the first alluvion.

.....

I. POINT—*ROMAN LAW.*

Dig. lib. 41, *tit.* 1. 30. § 1.—"Celsus the son, says, if a tree grows on the bank of a river which is opposite to my land, the tree is mine, *because the soil itself is my private property, though the use of it is understood to be in the publick*, and therefore when the river is dried up, it shall belong to the adjoining proprietors, because the publick has no longer the use of it.

2. *Inst. tit.* 1, § 5.—"The use of banks as well as of rivers, by the law of nations, is publick, and any one has a right to moor vessels to them, by ropes to the trees growing thereon—to deposit their lading there—as well as to navigate the river; but the property thereof belongs to those to whose land they join, for which cause the trees growing thereon belong to them."

SPANISH LAW—I. POINT.

3 *Partidas*, *law* 6, *tit.* 28—"The rivers and ports and publick ways, belong to all men in common, so that strangers may use them as well as inhabitants. *And although the banks of rivers belong as to the dominion, to those to whose estates they are joined*, yet notwithstanding this every man may use them, tying their vessels to the trees which grow thereon; mooring their ships, and depositing their sails and merchandize thereon, and the fishermen may also place their fish there, and sell them, and dry their nets and use the shores for all such things as belong to their trade"

Ibid, *law* 7.—"All the trees which are on the banks of the rivers belong to those who have the ground adjoining to the banks, and they may cut them or cause them to be cut, or do with them what they please."

.....

II. POINT.

Dig. lib. 43. *tit.* 12, § 5.—"A bank properly defined, is that which contains the river in the natural course of its waters; but it does not change its banks when it is at times swelled, either by showers or by the sea, or by any other cause, for no one has ever yet said that the Nile, which covers Egypt by its encrease, has thereby changed its banks, but when it is reduced to its usual height, the banks of its channel may be dyked in. But if it shall have naturally risen as to obtain a permanent encrease by the confluence of another river, or by any other means, without doubt in that case, we should say it had changed its banks, in like manner as if, having changed its bed, it should begin to run in another course."

Ib. §.—"If a river shall overflow, but not make to itself a new bed, then that is not publick which is thus overflowed."

.....

III. POINT.

C. lib. 7, *tit.* 41.—"Although it may be not lawful to change the course of a river by making another by manual labour, yet it is not prohibited to guard its bank against the force of a rapid river—and when having left its former bed, it shall make another for itself, the land which it surrounds shall belong to the first proprietor; but if this take place by degrees and is thus applied to the other part, that by the law of alluvion shall belong to him whose land is thus encreased."

Ib. § 3. *Ed. Theod. & Valent.*—" By this law, which we sanction as perpetual, we order that whatever is acquired to the proprietor by alluvion (either in Egypt by the Nile, or in the other provinces by other rivers) shall neither be sold by the treasury, nor demanded by any other, nor separately estimated nor burthened with duties."

Dig. lib. 41. *tit.* 1. 7. § 1. *& Inst. lib.* 2. *tit.* 1. § 20—" Whatever the river adds to our land is ours by natural law; that shall be considered as added by alluvion, which has encreased by such slow degrees that we do not know how much, and what particular time it was added—but if the force of the river shall detach a part of thy field and add it to mine, it shall remain thy property."

.....

SPANISH AUTHORITIES—III POINT.

3 *Partidas, law* 26—" Rivers *(a)* swell sometimes so that they take away and diminish the inheritances that are situate on their banks, and they give to and encrease others that are on the opposite side.—Therefore we say that whatever is carried off by a river by little and little so that the quantity cannot be perceived because it is not taken off in a body, this shall be gained by the owner of that inheritance to which it is added."

Ib. law 31—" Rivers sometimes change the places in which they used to run, making to themselves a new course, and leaving dry the place where they formerly flowed—And whereas contestations may arise who ought to have the part that is thus left dry, we say that it belongs to those whose inheritances adjoin, each one taking a part according to his front on the river, and those through whose land it begins to run anew, shall lose the ownership thereof, for the space which it covers, which from that time shall be of the same nature with the other place over which it used to flow, and shall be changed into publick property like the river.

.....

IV. POINT.

Dig. lib. 41. *tit.* 1. § 38.—" Attius had a field on the publick road—Beyond the road was the river and the land of Lucius Titus; the river by little and little encroached and took away the land which lay between the road and the river, and afterwards the road its self—afterwards by degress it receded, and by means of

(a) This is to be understood of a *public river. Com. Greg. Lopez.*

alluvion again occupied its former bed—On this case he answers, when the river took away the land and the publick way, the encrease on the other side the river belonged to him whose lands were there; afterwards when by little and little it retired, it took it away again from him whose lands had been encreased, and added to him whose lands were beyond the road, *because his land was nearest the river;* that however which belonged to the publick [the road] was not acquired by any one Nor was the road (he says) any impediment to prevent the land which was made beyond the road from becoming the property of Attius."

Ib. 30. § 3....Alluvion restores that land which the force of the river hath taken away; therefore if the land which was between the publick way and the river be occupied by the river, (whether this happen by little and little or not) and it be restored at once by the retiring of the river, it belongs to the former proprietor. *For rivers perform the office of publick assessors, they adjudge private property to the publick, and publick property to private persons.*"

.....

V. POINT.

Dig. 41. 1. 56....An island arose in the river opposite the front of my land so that its length did not exceed the front of my property; afterwards by degrees it encreased and extended itself opposite the fronts of my upper and lower neighbours—I ask whether the encrease is mine, because it is added to my property, or whether it is the right of him to whom it would have belonged if it had first arisen at the extremity of its present length?

Proculus answers: The river in which you state the island to have arisen in such manner that it does not exceed the extent of your front, if it has the right of alluvion, and the island in the beginning was nearer your land than the other shore, the whole is yours—although it hath so happened that the island hath extended opposite the part of your upper and lower neighbours, or even though it should extend so as to be nearer the land of him who possesses the opposite shore.

.....

NOTE G.

AFFIDAVITS OF LA ROCHE AND SEGUR.

LA Roche, being duly sworn, doth depose and say, that in the year seventeen hundred and ninety-five, and for some time previous thereto, Laurent Segur, the father-in-law of this deponent, had a contract for supplying the royal navy of Spain with masts. That in the spring of the said year, a very large raft of masts

having come down the river, and that part of the shore below the city where they had been usually placed, being very much encumbered, the said Segur desired the deponent to go to the governor (then the baron de Carondelet) to get his directions where he should deposit the said masts.

That the deponent accordingly went to the Baron de Carondelet, with Mr. Lovio, the minister of marine, who, after hearing the statement of the case, directed the deponent to go to Bertrand Gravier, and request him in his (the governor's) name, to give permission to lay said masts on the batture in front of the fauxbourg—adding that if Gravier refused, he would endeavour to find some means of making him consent.

That the deponent accordingly went to Gravier, with the governor's message, who readily consented, and the masts were accordingly placed on the batture, where they remained for a long time, at least eighteen months.

And this deponent further saith, that some time after the period above spoken of, and as he thinks in the year seventeen hundred and ninety-eight, Bertrand Gravier being then dead, he was again sent on a similar message to governor Gayosa, then governor of the province, who directed the deponent to go to John Gravier, the present proprietor, and ask his permission to lay up the masts on his batture, which the deponent did. Gravier consented, and the masts were accordingly placed on the batture opposite to Mr. Eva's the captain of the port, and from thence upwards.

And the deponent further saith, that Bertrand Gravier had for a number of years, a very large brick-kiln and that he always took the earth for the same, from the said batture, and from no other place.

ROCHE.

Sworn to and signed before me,
March 21st, 1808.

B. VAN PRADELLES,
Justice of Peace.

LAURENT SEGUR, being duly sworn, deposeth and saith, that he sent the above deponent La Roche, to the governors Gayosa and Carondelet, at the several periods and for the purposes mentioned in the preceding deposition, and that the answers then reported to him by the said La Roche, as coming from the Baron de Carondelet, governor Gayosa, Bertrand Gravier and John Gravier, perfectly accord with the statement in the above deposition.

L. SEGUR.

Sworn to and signed before me,
March 21st, 1808.

B. VAN PRADELLES,
Justice of the Peace.

MASSACHUSETTS DISTRICT, MAY, 1809.

Peter H. Natterstrom, Administrator of John Taylor, deceased,

VS.

Ship Hazard, William Smith, late Master.

[The law maratime will not sustain a claim for wages, by the legal representatives of a seaman, beyond the time of his death, when the engagement was by the month.

There is no express decision of this point to be found in the English books, and much diversity of opinion prevails among the elemental writers. In the case of *Walton, administrator of Strum, vs. the ship Neptune*, in the District Court of Pennsylvania,* Judge *Peters* decreed wages to the representative of a deceased seaman subsequent to the period of his death. The Judge appears to have relied chiefly upon the 7th art. of the laws of Oleron, the fact that the ship had carried freight and his construction of the shipping articles, that the contract is *for the voyage* though monthly wages are stipulated The principle was adopted by Judge *Washington*, on an appeal to the Circuit Court for the same District, in the case of *Jackson, vs. Sims.* †

It is much to be wished that the question could be brought before the Supreme Court; but it is not probable that a case may soon occur of sufficient magnitude to authorize an appeal to that tribunal.]

DAVIS, *Dist. J.*‡ John Taylor, on the 18th July, 1805, entered on board the ship Hazard, at Boston, as a mariner, for a voyage to the North-West coast of America, from thence to Canton, in China, and back to Boston, at the monthly wages of sixteen dollars, and signed articles in common form. The ship, soon afterward, sailed on the proposed voyage, and on the 17th day of October, 1805, Taylor, with three other seamen, while manœuvring the

* Pet. Adm. Dec. 142. † Ibid. 156.

‡ From a copy corrected by Judge Davis.

ship, in a gale of wind, were carried overboard by a sea, and drowned. The ship performed the contemplated voyage in safety, and returned to Boston, on the twenty-third June, 1808.

It appears that Taylor received thirty-two dollars advance wages, before the ship sailed from Boston, and that disbursements were made to him on the voyage, by the master, to the amount of thirty-five dollars and fifty cents, exceeding, in the whole, the amount of wages, to the time of his death. The respondents allege, and it is not denied by the libellant, that by reason of the death of said Taylor, and of the three other seamen who perished with him, the master of the ship was obliged to proceed to Rio-Janeiro, where he arrived on the 11th November, 1805; there to hire four other seamen, which he accomplished at high and extravagant wages, to replace those who were lost, and to enable him to prosecute the voyage aforesaid; and they further allege, "that it is and ever has been the usage, custom, and practice of the trade, in which said ship was employed, in the voyage aforesaid, for the owner or master of the ship or vessel to pay, and the legal representatives of any mariner belonging to a ship or vessel, who had signed articles of agreement or a shipping paper, and happened to die on the voyage, to receive the wages accruing to such mariner, from the time of his entering on board such ship until his death, at the rate expressed in such articles or shipping paper, in full satisfaction of all claims and demands of such representative against the owner or master of said ship or vessel, for the wages or services of such deceased mariner."

This cause has been amply discussed, and it remains to determine the only question on which it depends; what is the legal effect and operation of the death of the mariner, Taylor, in manner and at the time above stated, on his wages? For the libellant it is contended, that the same amount is by law due, as if he had survived and continued in the service of the ship during the whole voyage. On the other hand, it is contended for the respondents, that his wages, at the stipu-

lated rate, are only to be reckoned to the time of his decease; and, of course, that the libel ought to be dismisssd, as more than the amount of wages, due on that principle of computation, had been paid to the deceased.

The counsel for the libellant rests his claim on the 7th article of the laws of Oleron, the 19th of Wisbuy, and the 45th of the Hanse Towns; and on a late decision in the Circuit Court of Pennsylvania, *Jackson's administratrix vs. Sims*, affirming a decree of the District Judge, by which full wages, for the whole voyage, were given to the legal representative of a seaman who had engaged for a voyage from Philadelphia to Batavia, and back, and who died, in the course of the voyage, at Batavia. [Peters adm. decisions 157.]

In the examination of this subject, I shall first inquire into the genuine meaning and import of the ancient ordinances above mentioned, in reference to the point under consideration. We have, I presume, a correct text of the laws of Oleron, in the *Us et Coustumes de la Mer*, by Cleirac. The 7th article prescribes the duties of the master, when a mariner falls sick, in the service of the ship. It directs, that he shall be put on shore, and that suitable humane provision shall be made for him. The closing paragraph, which, alone, has special application to the question now under consideration, runs thus; "Et si la nef estoit preste à s'en partir, elle ne doit point demeurer pour luy; et s'il guarit, il doit avoir *sou loyer tout comptant*, en rabatant les frais, si le maistre luy en a fait; Et s'il meurt, sa femme et ses prochains *le doivent avoir pour luy*." "And if the vessel be ready for her departure, she ought not to stay for the said sick party; but if he recover, he ought to have *his full wages*, deducting only such charges as the master has been at for him. And if he dies, his wife or next of kin shall have it."

I resort to the same author for the correspondent articles in the other ordinances, not having been able to find any copy of the original text.

Ordinances of Wisbuy, Art. 19.

Si le matelot tombe en infirmité de maladie, et qu'il convient le porter à terre, il y sera nourri comme il estoit dans le bord, garde et servy par un valet, et s'il vient en convalesience *sera paye de ses gages ;* et s'il decede, *ses gages et loyers seront payez* à sa vefue, ou à ses heretiers,

If a seaman falls ill of any disease, and 'tis convenient to put him ashore, he shall be fed as he was aboard, and have somebody to look after him there ; and when he is recovered, *be paid his wages ;* and if he dies, *his wages shall be paid to his widow or heirs.*

Laws of the Hanse Towns, Art. 45.

Que s'il revient en convalescence, *il sera paye de ses gages tout ainsi comme s'il avoit servy*, et s'il meurt, ses heretiers *les retireront entierement.*

If he recovers his health, *he shall be paid his wages, as much as if he had served out the whole voyage ;* and in case he dies, his *heirs shall have what was due to him.*

I adopt the translation given in the "Sea Laws," first published in England, in the reign of Queen *Anne*, not from a respect to the translation of those ordinances, in general, as contained in that work, for in several instances it is palpably incorrect, but because, from its long standing in our language, it is entitled to consideration, and in the articles now cited, it gives, to my apprehension, the sense of the text, with sufficient correctness. Stress has been laid, by the respondents' counsel, on a supposed mistranslation of the article from the laws of Oleron. It is said that the word *comptant* means *money down*, and, that the addition of the word *tout*, to the word *comptant*, only renders the expression more emphatick. However this may be in modern *French*, and there are certainly respectable authorities in support of the criticism, I am convinced, that something more was intended by the phrase, as used in the article cited, and that it was designed to express not merely the mode of payment, but has reference to the *quantum.*

It is evident from Cleirac's comment, that he so understood it ; and I consider the meaning to be the same, as is

conveyed by the word *entierement*, which he uses in translating the cited article of the laws of the Hanse Towns. *Valin*, in his discussions relative to wages, frequently uses the phrases *en entier & en plein*, which are of equivalent import. But these modes of expression do not, necessarily and universally, imply an absolute payment of the wages for the *whole voyage*. Such, indeed, is their frequent application; but we also find expressions of this description employed, when a payment of wages, for a less time than the whole voyage is most evidently intended.

The third article of the laws of *Wisbuy* directs, that if a master discharge a seaman without just cause, after the commencement of the voyage, he shall pay him "*entierement, tous les gages promis.*" This passage, in the Sea Laws, is rendered "all his wages as much as if he had performed the voyage." This is a free translation, but it gives the sense of the original; and the regulation corresponds with the principle of the 13th. article of the laws of Oleron, by which an offending seaman, if tendering amends, is to be retained, and if discharged after such offer, is entitled to *full wages*, as if he had continued in the ship. The expression there is "aussi bon loyer comme s'il estoit venu audedans" —"as good hire as if he had come in the ship," equivalent to *entierement*, tous les *gages promis*, in the third article of the laws of *Wisbuy*, and to *tous leurs loyers*, in the 20th article of the laws of Oleron, applied to a contract by the *run*, when the voyage is abridged by the act of the owner or the master, in proceeding, with the ship, to some port nearer to the place of departure and destined return, than was stipulated in the contract. Other instances might be cited, where this meaning must be understood, but there are also many, in which expressions of this description must have a more restrained construction. Valin, in commenting on a royal ordinance of France, framed to determine a question relative to ships ordered to a certain station, and there to wait for convoy, recites it in the following terms; "la solde des gens des e'quipages seroit payèe *en plein* du jour que les

In this there is, to my apprehension, a perfect correspondence between *Pothier* and *Valin*. The latter writer, commenting on the 13th article, which relates wholly to what the *heirs* shall recover, commences his remarks by stating, what the deceased seamen had acquired. "Le matelot ayant gagné ses loyers jusqu'à son décès arrivé pendant le voyage, et cela, aussi bien durant le temps de la maldie que pendant celui qu'il a rendu un service effectif au navire, il est bien juste qu'ils passent à sa veuve et heretiers." "The seaman having earned his wages to the time of his death, happening, during the voyage, as well during his sickness, as for the time when he rendered actual service on board the ship, it is just that they should go to this widow and heirs."

In this passage, Valin evidently has reference to the 11th article. In his comment, on that article, he denominates the disposition which it makes relative to wages of a sick seaman, as a right to wages *en plein*; an expression which must be understood, as it is used by Pothier, in this connexion, to intend, merely, that there shall be no diminution of wages on account of sickness.

It is to be understood, that I do not consider the dispositions made by the articles of this ordinance, as an authoritative settlement of the question; though they are most explicit in their terms. I only resort to them and to the commentators above mentioned, with a view to a right understanding of the phraseology employed in the articles of the laws of Oleron, Wisbuy, and the Hanse Towns, all of which are given in the *French* language by *Cleirac*, and from whose work the received English translation appears to have been made. From this examination, I am satisfied, that the terms *tout comptant*, *en entier*, or *entierement*, as applied to wages, do not, necessarily, mean wages for the whole voyage; that they admit of a different and more limited application, according to circumstances, and that the true meaning, in the respective instances, in which they are employed, must be determined from the subject matter and the connexion. *Noscitur ex sociis.*

I may further add, that it is not unfrequent, where the meaning might be otherwise equivocal, to add expressions, which render the sense perfectly certain, such as "comme s'il avoit servi tout le voyage," or the like. Applying these views of the language of the law, which we are considering, to the 7th article of the laws of Oleron, and to the correspondent articles in the laws of Wisbuy and of the Hanse Towns, I cannot find, that those articles either express or intend that the heirs of a seamen dying in the course of the voyage, shall recover wages in his right, as if he had lived and served out the voyage. The object of all those articles is to make suitable dispositions relative to seamen falling sick on a voyage. They direct how they shall be treated, and what shall be the results as respects their wages, in case of recovery, or of death. The expression, *tout comptant*, in my apprehension, means nothing more, than that there shall be no deduction on account of sickness, either as against the seaman himself, if he recover and claim his wages, or against his heirs in case of his decease. Two interesting points were established, by these articles, both wisely and humanely calculated to sooth the sorrows of the sick, or disabled mariner; that his calamity, if not produced by his own criminality or fault, should not diminish his stipulated wages, during the existence of his disability, or his necessary absence from the service of the ship from that cause; and that in case of his death, all that was due to him should descend to his heirs. Both these provisions seem so perfectly reasonable, that, it may at first view appear, that a formal article, could hardly be necessary to enforce them, and we may, on this ground, be induced to apprehend that something more was intended. But the first point is, even now, occasionally questioned by the ship owners and masters, and, we may easily satisfy ourselves, that, it then appeared necessary that both should be declared. The application of the Roman law *de locatione et conductione*, to which Pothier expressly refers, for a construction of the contract of hiring of labour, in general, and for the hire of seamen, in particular, would ex-

clude a claim for compensation, during the disability of the servant or labourer. But, as generous masters, says this esteemed commentator, will not insist on a strict enforcement of their rights, but continue the compensation of a sick servant, notwithstanding his disability to perform his stipulated services, so the law marine in relation to mariners, converts into an obligation, what in other instances of hire, is the result of benevolence. The object of the law, he adds, is, for the encouragement of seamen, and as a compensation for the risk which they run, of an entire loss of wages, from inevitable accidents occuring to the ship, or from a destruction of the voyage. *Louage des matelots.*

Doubts derived from the rules of law relative to entirety of contracts, and perhaps also some principles of the law *de societate*, might have rendered necessary the express declaration, in favour of heirs, that is made by the articles under consideration. A simple provision was made by the *Consolato del Mare*, and we learn from Cleirac, that it was the express object of an ancient ordinance of France, to declare such right of succession in favour of the heirs of mariners, dying on the voyage. " Si le marinier meurt a voyage, les ordonnances de France conservent ses biens à ses heretiers en termes generaux, sans parler precisement, comme fait ce jugement, des loyers ou gages meritez ou à meriter." " If a mariner die on the voyage, the ordinances of France preserve his property to his heirs, in general terms, without specifying, as this article does, wages earned or to be earned." *Cleir. 34. on art. 7. of laws of Oleron.*

It is not necessary, therefore, in order to satisfy the expressions in the laws of Oleron, and in the other ancient marine codes, to consider them, as giving to heirs of a mariner, dying on the voyage, the same amount of wages, as the deceased would have received, if he had lived until the termination of the voyage. I admit, indeed, that the phrase *tout comptant*, in the laws of Oleron, is to be understood to apply to the heirs as well as to the seaman, as the word *entierement* is, in the laws of the Hanse Towns, and, that these

terms are well enough rendered, by the expression *full wages*. Still it remains to be determined, what is the precise import of these expressions, used in this connexion.

The apparent or plausible ground, on which a diminution of wages may be claimed, by a master, against a seaman, being, in any case, suggested, will enable us to determine in what sense, the words *en entier* or *entierement*, are to be understood. When a seaman is discharged without good cause, no question could occur to any reasonable mind, relative to his earnings to the time of his discharge. Whatever doubt might arise, in regard to his claim for wages, would respect the remainder of the voyage, from which he was wrongfully expelled. In such a case, therefore, we must understand, the term *entierement*, in the third article of the laws of Wisbuy, to intend wages for the whole voyage. But in the cases supposed by the 7th article of the laws of Oleron, the only ground, which could be suggested for a subtraction of wages, is the sickness and disability of the mariner: and when it is said, he shall, notwithstanding, receive his wages *tout comptant*, it is apparent, that nothing more is intended, than that no deduction shall be made on that account. An application of this construction, to the different cases, that might occur, will test its solidity.

1st. With regard to the seaman himself. If he recover, says the law, he is to have his wages *tout comptant*. If after such recovery, he rejoin the ship, before the completion of the voyage, his right to wages *tout comptant*, or to full wages, must, in such a case, evidently mean, that no diminution shall be required on account of his non-performance of duty or absence from the ship by reason of sickness. His claim to wages, for the residue of the voyage, will depend on future services and circumstances and not on the provisions made by the law relative to the operation of his sickness. A like construction of the article must, I apprehend, be given, if a seaman, who may be left abroad sick, should recover and return home, before the arrival of the ship, and the ship should afterward arrive in safety. If the sickness be supposed to be

of such continuance, that he be not able to return to the ship during the voyage, but he survives the prosperous termination of the voyage and returns home after the arrival of the vessel; he shall in like manner, by the articles cited, have wages *tout comptant*, or *entierement*, or *full wages*. The wages in this case, would, indeed, be for the *whole voyage*; but the force and meaning of those operative expressions are the same as before. He shall receive wages for the whole voyage, not because *tout comptant*, *entierement*, or *full wages*, necessarily and exclusively mean wages for the whole voyage; but because, as in the other case, they protect him from a deduction from his wages on account of sickness, and the sickness or disability, which entitled him to indulgence, is supposed to have continued until the termination of the voyage.

2d. In regard to the *heirs* of such *deceased seaman*. I understand the same expressions, by fair implication, to extend to them, but in the *same sense*. If the sick seaman survive the prosperous termination of the voyage, and afterwards die, without having recovered his wages, his heirs shall recover them *entierement* or *tout comptant*. But, in this case, the same remarks are applicable, which have been suggested relative to a demand for wages by the seaman himself, after such conclusion of the voyage; and, for the same reason, the meaning of the terms *entierement* or *tout comptant*, remains, in this case, equally unchanged. The right to wages, in such a case, for the whole voyage, results not from the mere force of those terms, but from this concurrent, essential fact, the continuance of the disability or absence from that cause, commensurate with the voyage.

The death of the seaman, before the termination of the voyage, presents a case involving the very point in question. In such case, also, the heirs shall receive the wages *entierement* or *tout comptant*. But we ought to understand those terms, in the same sense as they are evidently to be understood, in the preceding cases. If we construe them as giving to the heirs the wages, for the residue of the voyage, we, in

fact, change their meaning, or include an idea not implied in those terms, in the other cases supposed. This would appear to me an inadmissable mode of construction, as the subject matter, to which the terms are applicable, is unchanged. In the case of a seaman wrongfully dismissed from a ship, his connexion with the ship is dissolved by the mere injurious act of the master. This act gives to the seaman an immediate right to wages for the whole voyage, subject, indeed, to contingencies which may defeat the voyage and of course his claim. But the object of the provisions relative to disability was not to give a new right to the seaman, in consequence of his falling sick, but to protect him from loss. I am satisfied, therefore, that the expressions referred to, must, in case of death during the voyage, be understood in the same sense as in the other cases, and that they mean nothing more than a security against any diminution of the wages, on account of sickness.

In this manner, it appears to me, these articles were understood by the commentators; and I find no intimation, either in *Cleirac* or *Valin*, that they considered the heirs entitled to wages by these articles, beyond the death of the seaman, whom they might represent. Cleirac, under the 7th. article of the laws of Oleron, mentions the ordinances of Charles V. giving to the widows or heirs of a seaman, dying on the outward voyage, one half the wages agreed for, and, if dying on the homeward voyage, the whole wages. He remarks the correspondence of this provision with the dispositions made by the *Consolato del Mare*, which also provides, that the heirs of a seaman, who was engaged by the month, shall be paid according to the time that he may have served. He then proceeds to notice a more favourable provision for widows and heirs of deceased seamen in ships of war, or long voyages; that, if a man should die, on the first day after the commencement of the voyage, his heirs should be paid for the whole voyage. "Ses heretiers seront payés pour tout le long du voyage." If *Cleirac* intended to compare this generous provision with the disposition made by the

laws of Oleron, he could not denominate it, *more favourable*, on the construction contended for by the libellant's counsel in this case; for, on such construction, the provision by the seventh article of those laws, would be, in fact, the same as is noted by *Cleirac*, to have been observed on board ships of war. But if he is to be understood as making a comparison with the regulations of Charles V. and of the *Consolato del Mare*, previously mentioned in his note, it would still appear unaccountable, why this instance of such generous provision should be alone selected, and that he should be silent as to a like disposition, made by the very article on which he was commenting, according to the construction contended for by the counsel for the libellant. The strongest aspect in *Cleirac*, in another direction, is in the expression, " loyers ou gages *merite'z ou a' meriter*," in the note above quoted. But I understand the word *merite'z* to refer to the wages earned while the mariner was performing service, and *a meriter*, not to have reference to any supposed accruing of wages after death, but to those earned or considered as earned during sickness and disability, or absence from the ship from such causes.

Valin, it is well known, is copious and minute; and abounds in references to the laws of Oleron, Wisbuy, and the Hanse Towns, and to Cleirac's commentary. I cannot find, in his ample and very valuable work, any recognition of the doctrine, that by the laws of Oleron, Wisbuy, or the Hanse Towns, the heirs of seamen dying on the voyage, should recover wages, as if such seaman had served out the voyage.

The 15th article of the ordinance of Louis XIV. provides, that the wages of a seaman, killed in defending a ship shall be paid in full as if he had served the whole voyage, provided the ship arrive in safety. We should expect the commentator, under this article, to remark its correspondence with the laws of Oleron, Wisbuy, and the Hanse Towns, relative to seamen dying from any other cause, if, in his opinion, those laws were to be thus understood. On such extended

construction, also, of the 7th. article of the laws of Oleron, we should expect the commentator to notice its repugnancy to the 11th. article of the ordinance of Louis XIV. We find no such intimation; but from a careful inspection of his comments, particularly on articles 11th. 13th. and 14th. I am satisfied, that this able writer did not understand the laws of Oleron, Wisbuy, and the Hanse Towns, as giving a claim to wages beyond the death of the mariner. It should be observed also, that if the 7th. article of the laws of Oleron, did, in true or received construction, give full wages for the whole voyage, *in all cases of death, on the voyage*, without fault on the part of the mariner, there could be no necessity, as those laws constituted a portion of the marine law of France, to make the special and exclusive provision of that nature, for a seaman killed in defending the ship, as is done by the 15th. article of the ordinance of Louis XIV.

It is material in the next place to enquire, how these ancient marine codes have been generally understood in the countries originating them. I can find no evidence, that they have, in any European country, been applied in the sense contended for, in this case, in support of the libellant's claim. It is well observed by Valin, that next to equity in a law, are its perspicuity and brevity. The 7th. article of the laws of Oleron and the correspondent articles in the other ordinances, are sufficiently brief. They are not remarkable for perspicuity, and, on the construction contended for, in support of the present claim, would not be equitable. There would result one fixed, invariable rule, in case of the death of a seaman, during the voyage, whatever might be the nature of the engagement, whether by the month, for the voyage, part profit, or freight. If there had been no other resource, some tolerable system might, by a course of decisions, have been founded on the basis of this article, relative to the cases of death of mariners during the voyage; but it does not appear that the law upon this subject has been extracted from this source, excepting so far as relates to the operation on wages of sickness, and disability of a seaman.

The fact is, that exact and definite provisions, reasonably accommodated to the necessary diversity of occurrences, had before been established by an excellent and venerable code, originating among a very intelligent and highly commercial people. I refer to the Consolato del Mare; the 127th. article of which expressly provides, that the heirs of a seaman, engaged by the month, and dying on the voyage, shall be paid his wages for the time of his service. *Se il marinaro è accordato a mesi, et morirà, sia pagato, et dato alli suoi heredi per quello, che havessi servito.* The preceding article directs, that if the engagement be by the voyage, half or the whole shall be received by the heirs according to the period of the voyage in which the death should occur.*

These articles of the *Consolato* are quoted by *Cleirac;* and from the manner in which *Valin* refers to them, and to Cleirac's quotation, I understand him to mean, that they constituted a portion of the received marine law of France, on this subject.

* There is a diversity, in the different editions of this work, in the numbers of the chapters. The edition here quoted is that of Leyden; printed in 1704. In *Cleirac's* commentary, the chapter here referred to as the 127th. is quoted as the 130th. *Valin* cites it by double numbers. The *Consolato del Mare* contains precise regulations on several topicks, not contained, or only incidentally mentioned, in the laws of *Oleron*, of *Wisbuy*, or of the *Hanse Towns*. It is to be regretted that a work, so comprehensive and valuable, should be so rare, and it appears surprising that an English translation of this venerable code has never yet appeared A French translation, with commentaries and dissertations of much promise, has recently been announced. [Anthology, for February last.] It may be hoped, that this example will be duly emulated, and that a long time will not elapse, before our *Bibliotheca Legum* shall present this valuable work, in our own language

[A translation of that part of this celebrated code which relates to the manner of proceeding before the consular court, shall be commenced in the ensuing number. The whole work shall appear as speedily as the editor can prepare it for the press. The French translation, to which the learned Judge alludes, is published, as we learn from a correspondent, in two volumes, octavo; but the editor has not seen it.] Ed. Law Jour.

I have no means of information, of the application of the laws of Wisbuy, in this particular, in the countries, where they may be supposed to have had special influence or authority. In determining on the application of the laws of the Hanse Towns, it would have been satisfactory, to have consulted *Kuricke's* commentary on the revised code of those laws, of 1614. This work I have not been able to find; but in "*the Ship and Sea Laws, of Hamburg*" as contained in *Herman Langenbeck's* treatise, published A. D. 1727, there appears to be an affirmance of the law of *Oleron*, as to the manner in which a seaman, falling sick on the voyage, shall be treated; and, if he dies on the outward passage, the heirs are to have half his wages and privilege, if on the return voyage, the whole; deducting the expenses of interment. In this principal city, therefore, of the Hanseatick confederacy, we find an express partial adoption of the provisions, made by the *Consolato*, on this subject, with this only difference, that the Hamburg law, makes the same provision, whether, the contract be for the month or for the voyage, which the *Consolato* distinguishes. It is observable, that we do not find, in Langenbeck's commentary, any intimation, that, by the laws of the Hanse Towns, the heirs of a seaman, dying on the voyage, would be entitled to the whole sum, which such seaman would have earned, if he had lived to the end of the voyage. Such a disposition would have been materially different from that made by the 30th. article of the Hamburg laws, on which he was commenting, and if such diversity, in true construction, really existed, we must suppose it would have been noticed. The Hamburg regulations disregard the distinction that is made by the *Consolato del Mare*, between an engagement by the month, or for the voyage, as respects the amount of wages, to be paid, in case of death of a seaman during the voyage. The discrimination, made by the *Consolato*, is adopted by the Ordinance of Louis XIV. and, it is believed, was the previous maritime law of that country, by tacit adoption of that

provision in the *Consolato*. Pothier suggests a reason for the distinction. The seaman, who is engaged by the month, does not sustain the risk of calms, contrary winds and other impediments, which may prolong the voyage; however protracted, if not interrupted, or broken, so as to defeat a claim for wages, they are commensurate with the length of the voyage. Whereas one engaged for the voyage, runs the risk of an inadequate compensation for his services, by an accidental protraction of the voyage, beyond the term contemplated as the measure of his reward, when the contract was made. On this ground, says Pothier, the Ordinance proceeds, corresponding in this particular, with the *Consolato del Mare*, and, as a compensation for the different risks, is the distinction made. [Louage des Matelots.]

I proceed to inquire, how the law, on this subject, has been considered and received in *England;* a question, for obvious reasons, of material importance. The rules and proceedings in maritime matters, in that country, became ours, by express adoption, in the first New-England colony; (Plymouth Colony Laws, 48.) and the law on this subject, as understood and practised in that country, before our revolution, may be considered as making a portion of our law, unless, some other express provision, adverse decisions, or contrary received usages, either before or since the revolution, should have effected an alteration.

The foreign ordinances, on maritime affairs, have not the binding force or authority of law in England, not even the laws of Oleron, to which that nation have long been, and still are, particularly partial. The extent of the adoption of any article of those laws, in that country, and the sense in which they are received, can only be learned from the decision of their courts, and the approved treatises of their eminent juridical writers.

To Godolphin's "View of the Admiral Jurisdiction" there is annexed an appendix containing a translation of the laws of Oleron, with notes and observations. That part of

the 7th. article, which is relied on in this case, is thus rendered. "He ought to have his full wages *or competent hire*, rebating or deducting only such charges as the master hath been at for him, and, if he dies, his wife or next of kin to have it." To this is added the following note; "Executors of a deceased mariner, ought to receive the *wages due to him.*"

I would here make the same remark as I have before suggested relative to the translation given in the "Sea Laws."

I do not introduce the translation, inserted in that appendix, from a respect to its general correctness, for there are some palpable and some whimsical errors.* But the translation, given in the treatise, of the 7th. article of the laws of *Oleron*, with the note, subjoined, appear to me to evince, that this learned civilian did not receive the article in a sense, which would support the present claim. Molloy, in referring to the articles of the laws of Oleron, copies the provisions relative to the seaman's right to wages, if he recover from his sickness, but altogether omits the provision respecting the heirs. He inserts the substance of that article of the Rhodian law, which subjects the master to the payment of

* A remark of this sort may seem to require verification. Two instances, only, will be mentioned in this place Art. 14th, "*Oster la trouaille trois fois.*" is understood, in this translation, to mean *three times lifting up the towel*, and it is thus copied into Molloy. The true meaning, *a denial of the mess three times*, is given in the *Sea Laws* and in other subsequent compilations.

Art. 9th. *Les mariniers doivent avoir un tonneau franc, et l'autre doit* PARTIR AU JECT, is thus translated; "The mariners also, ought to have one tun free and another *divided by cast of the dice.*" This rendering is followed in the *Sea Laws*, in Postlethwayt's Dictionary of Trade and Commerce, and in some later publications. It is evident from *Cleirac's* commentary, that the contribution to a Jettison, intended here to be directed, is not to be decided by *cast of the dice.* The seamen are to have one tun free, and the remainder of their *privilege* is to contribute its proportion. The article, says the commentator, "*ordonne pour les mariniers un tonneau, franc en la contribution, et veut que la reste participe au jet.*"

a year's hire, to the heirs of a mariner, drowned in consequence of insufficient tackling. In both these instances, if it were part of the marine law, as received in that country, that in case of a seaman's dying on the voyage, his heirs were entitled to recover wages as if he had lived and performed the voyage, it was certainly a strange and culpable omission not to insert or to intimate it, in an elaborate treatise "de Jure Maritimo." But my opinion, on this part of the subject, does not altogether rest, on omissions of this sort. Later and more accurate English writers than Molloy, are very clear and express on this point. Abbot considers the construction of the foreign ordinances as doubtful. In the English law books, he says, there is no general decision on the subject; but refers to a case (Cutter v. Powell. 6 Term. Rep. 320.) in which he says, it *seems to have been admitted*, that the representatives of a seaman, *hired by the month*, would be entitled to a *proportion of wages to the time of the death*. In a late respectable work, Abbot's statement is confirmed by observations altogether similar. Comyns on contracts, 377. An inspection of authorities on this subject, as well as a respect for the accuracy of the writers of those digests, has satisfied me, that it is not, and never has been, the received law in England, either in the courts of common law or admiralty, that the heirs of a seaman, hired by the month, and who may have died in the course of a voyage, are entitled to recover wages, as if the mariner had lived and served out the voyage. In the case *Chandler vs. Grieves*, 2. H. Bl. 606, on the motion for a new trial, the court obtained a certificate from the admiralty, of the law marine, relative to the right of a disabled seaman to wages. It was certified, that according to the usage of the admiralty, a seaman disabled in the course of his duty, was holden to be entitled to wages for the whole voyage, though he had not performed the whole. The result was, that the rule was discharged. The amount actually recovered in the case, was not to the conclusion of the voyage, though it has been

frequently so stated even by English writers; but the rule being discharged, judgment must have been according to the verdict, which, was only for wages to the time of the ship's departure from Philadelphia, where the disabled seaman was left. It is admitted, however, that the principle, certified from the admiralty, and on which, it may be presumed, the court of common pleas proceeded in discharging the rule to show cause, would authorize and require a recovery of wages, under the circumstances of that case, for the *whole voyage;* and such I have observed to be the just construction of the laws of Oleron and the other foreign ordinances. But we have no opinion from the admiralty, nor in the common law authorities, that wages are recoverable, after the death of a seaman, for the subsequent portion of the voyage; and it is observable, that such a position is not found to be maintained in argument, though, if correct, it would, certainly, forcibly apply in several cases reported in the books. "In the case of a mariner's dying in the course of the voyage" says a learned judge of the court of common pleas, "*it should seem* that he is entitled to a *proportionate part* of his wages, unless he be excluded by the specifick terms of his contract." [Justice *Heath*, 3. Bos. & Pul. 425. Beale vs. Thomson.] An observation of this sort, from a learned judge of the court, and the dubious, qualified language of Abbot and Comyns, that a *pro rata* recovery of wages *seems to be admitted* in case of a death of a seaman on the voyage, who was hired by the month, indicate their views on this subject, and are inconsistent with the supposition that they considered the law as giving wages for the *whole voyage* in such case, or that such is the received law in England, on that subject.

In our own country, the law and usage appear to have been the same; in Massachusetts I may say, uniformly so.

We find indeed no decision. A demand of this description does not appear to have been made in legal shape, until since the late decision in Pennsylvania. The libellants counsel was apprised, that the court would hear evidence, of

any usage in support of this claim. None has been offered, and it was frankly admitted, that the contrary usage had prevailed, with the exception above expressed.

The uniform usage, as alleged by the respondents, is satisfactorily maintained. To introduce a different rule, would, in my opinion, be to give a construction of the contract, not contemplated by either of the contracting parties, and not consonant to the law, on the subject, at the time when the contract was made. I perceive in the report of the case determined in Pennsylvania, it is intimated, that the extreme severity on ship owners, of the operation of the decisions in the district court, has produced a general practice of inserting a covenant in the shipping articles, that wages shall cease on the death of a seaman. The introduction of such provisions may be attended with difficulties, among a class of men, frequently uninstructed, attached to old forms and habits, and who may be jealous of an express stipulation, though, in reality, altogether consonant to a tacit construction, by which they had ever been governed. It would be injurious to require it, unless absolutely necessary. From my view of the law on this question, it does not appear to be requisite, unless it be to avoid controversy, on a subject on which there is a diversity of sentiment. I regret this collision with opinions, which I highly respect. It was incumbent on me, under such circumstances, to weigh, with great deliberation, the grounds of a different persuasion; but such being my opinion, after thorough examination, I consider it a duty to declare it. I ought here to suggest the relief afforded to my mind, in regard to difficulties of this description, by an interlocutory opinion expressed by the Hon. Judge Cushing, at the last circuit court in this district, in the case of Oystead Admr. *vs.* the ship Perseverance, and by the consideration, that the decision now given, if erroneous, may be revised and corrected in a higher tribunal.

The examination which I have made on this subject, has led me to an affirmative conclusion on the following points.

1st. That by general principles of law, on a contract of hire, no compensation can be claimed beyond the death of the party hired.

2d. That the laws of Oleron, of Wisbuy, or of the Hanse Towns, do not provide, that in case of the death of a seaman on a voyage, wages are recoverable beyond the time of his death.

3d. That the intent of those ancient ordinances, in the articles relied on in this case, was to determine the effect and operation of sickness or disability, incurred in the service of the ship, during the voyage, and to provide for payment of wages, without *deduction on that account*, either to the seaman, if he recover his health, or to his heirs in case of his death.

4th. That it does not appear that those ordinances have, in those countries where they are peculiarly authoritative, been used and applied as entitling the heirs to wages, for any time subsequent to the death of a seaman.

5th. That approved commentators, such as Cleirac and Valin, do not establish the construction contended for in support of this claim.

6th. That the *Consolato del Mare*, a work of approved authority, in case of an engagement by the month, and death on the voyage, expressly limits the wages to be recovered by heirs, to the time of the death of the mariner.

7th. That the law marine has not been otherwise understood and received in England, but in regard to an engagement by the month, and death on the voyage, appears to be consonant to the *Consolato del Mare*.

8th. That in Massachusetts, the usage has uniformly been to make payment of wages, in such case; only to the time of the death of the seaman, and the law has been considered as consonant to the practice.

On these considerations, it is my opinion, that, the law maritime, which I am to administer, will not sustain a claim

for wages, by the legal representatives of a seaman, beyond the time of his death, when the engagement was by the month.

In the present case, advances were made exceeding the amount of wages, due at the time of the seaman's death. I therefore decree, that the administrator take nothing by his libel.

It is understood that no costs are claimed.

(Signed) JOHN DAVIS,
Dist. Judge, Massts. Dist.

LITERARY INTELLIGENCE.

ON Wednesday, 1st of November next, will be published, in One Volume, Octavo, THE PRACTICE AND JURISDICTION OF THE COURT OF ADMIRALTY: *In Three Parts.* 1st. An Historical Examination of the Civil Jurisdiction of the Court of Admiralty. 2nd. A Translation of Clerke's Praxis, with Notes on the Jurisdiction and Practice of the District Courts. 3d. A Collection of Precedents.

PARET RATIONE MODOQUE.

By John. E. Hall.

Preparing for the Press by the same author, a translation of the CONSOLATO DEL MARE, with notes.

THE

American Law Journal

AND

MISCELLANEOUS REPERTORY.

BY JOHN E. HALL, ESQ.
OF BALTIMORE.

VOL. II. OCTOBER, 1809. No. VIII.

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NO. VIII.

IL CONSOLATO DEL MARE.

THE JUDICIAL ORDER OF PROCEEDINGS

BEFORE THE

CONSULAR COURT.

TRANSLATED FOR THIS JOURNAL.

.....

[Before we saw the wish expressed by Judge Davis, p. 374 *ante*, we had formed the intention of enriching our *Bibliotheca legum*, with a translation of the venerable code of maritime laws which has long been known by the title of the *Consolato del Mare*. The part which we now present to our readers relates merely to the practice or forms of proceeding of the consular or commercial Courts in ancient times. It is a kind of introduction to the work, and by some commentators is supposed to be no part of it. But it is incorporated with the best editions.

The origin of this work, which boasts the honour of forming the rule of decision in commercial matters, for almost all Europe,* from the earliest ages of jurisprudence, has been disputed with as much tenacity as the birth-place of Homer.

The editor of the Amsterdam edition, printed in Dutch and Italian, contends that it was not written in the age of St. Louis,

* Targa, cap. 96. p. 395. Lubeck p. 110.

but that nearly 200 years prior to that time, in 1075, it was read at Rome in the convent of St. John of Lateran, and there sworn to by the people. Emerigon, who has all the accuracy and deliberation of a German commentator adopts the same chronology.

But in what age it first appeared, or in what tongue it first dictated its lessons, it has ever been received with that deference which is due to the source of sound principles. Whether it were first written in the dialect of Catalonia, or the language of Italy, is of no intrinsic importance to us.

Judge Davis speaks of a recent translation into the French tongue, as if it were the first. But in this the learned Judge is probably mistaken. Emerigon speaks of one which was given to the publick in 1577 by M. François Meyssoni, an advocate of Marseilles, and reprinted in 1635. The recent translation, the editor is informed by a correspondent, is in two volumes; but the second comprizes the whole of the Consolato. The first is said to be "a mass of undigested learning which might have been reduced to a few pages."]

CHAPTER I.

Of the mode of choosing Consuls and Judges of Appeal every year.

EVERY year, on Christmas day, at the hour of Vespers, the good ship owners, masters and mariners, the whole, or a majority of them, meet together in council, at a place by them chosen and appointed, as they have been accustomed to do in the City of *Valencia*, and there by election and not by lot, they or a majority of them, choose two honest men, skilled in the art of navigation, to be their consuls, and another person of the same, and not of any other profession to be judge. And this latter person so chosen, is to be judge of Appeals, which Appeals are made and prosecuted by virtue of a privilege obtained from the king and his predecessors, which privilege is possessed by the good men belonging to the seafaring profession.

CHAPTER II.

Of the Oath taken by the Consuls.

On Christmas day, the said consuls swear before the Civil Tribunal of the said city, in the principal Church thereof, as has been accustomed in the said City of *Valencia*, that they will well and faithfully execute the said office of the Consulate, and that they will do justice to all men whatever be their rank or condition, preserving their fealty and loyalty to their prince or king.

.....

CHAPTER III.

How the Judge of Appeals is presented.

The festival of Christmas being over, the consuls together with some good men of the seafaring profession, present the said judge elect, to the governor and procurator of the kingdom of *Valencia*, or to his lieutenant, and he swears before him that he will well and faithfully behave in his said office. And he who is presented by the said consuls to the said Governor as Judge of Appeals, is, on his being thus presented, accepted by the governor or procurator as judge of the said appeals; and thus, it is the custom to do, although the privilege expressly says that the said judge shall be annually elected by the king, or his procurator, but neither the king nor his procurator have exercised that right since the granting of the said privilege, and therefore the custom has been, and still continues, as above mentioned, and it is held valid.

.....

CHAPTER IV.

How the Consuls appoint a Register for themselves and for the Judge of Appeals.

The consuls appoint such a person as they think proper to be their register, and if he, who acted as such the preceding

year, appears sufficient to them, they confirm him in the said office for the year following, and afterwards the newly appointed consuls, if they are satisfied with him, confirm his appointment. And the said judge must make use in his registry, of the register so appointed by the said consuls, so that the proceedings before the said judge may be carried on in the same form as those before the said consuls. But the said consuls may, within the year, and at any time that they may think proper, remove the said register from their office, and give his place to any one that they may choose, which removal and dismission the said register cannot oppose.

.....

CHAPTER V.

Of the form of the seal of the Consuls.

The consuls have a seal for their court of a round shape, on which is an escutcheon, on two third parts of which are the king's arms, and on the other third part, certain waves of the sea. Round the said escutcheon is written, *Sigillum Consulatus Maris Valentiæ pro Domino Rege*, with the same seal the judge seals all necessary instruments, and it remains in the custody of the register of his court.

....

CHAPTER VI.

Who may be Consuls, and who Judges.

Those who are consuls for one year, cannot be so the succeeding year, but other consuls are elected, and the judge is changed every year, but he may be re-elected the third year. And moreover, he, who has been consul, may be elected judge, and thus the judge may be elected consul for the succeeding year.

CHAPTER VII.

How the Consuls may substitute others in their place.

The two consuls together, or one of them, for cause of sickness, or business, or of being obliged to leave the city of Valencia, may substitute in their places whomsoever they shall think proper, provided they belong to the seafaring profession, and the judge may do the same.

.....

CHAPTER VIII.

Of the order of proceeding before the consuls.

When a libel is exhibited in writing before the consuls, respecting a matter within their cognizance, and which is to be determined according to the customs of the sea, they are to send by their messenger a copy of the said libel to the adverse party, and the adverse party is to give in his answer thereto within the time prescribed by the said messenger, by order of the consuls. The defendant, in his said answer, is to state the reasons of his defence, and if he has any cross demands, he is to insert the same in his said answer; to which reasons of defence and cross demand (if any be inserted) the original plaintiff is bound to reply, and also give the reasons of his defence (if he has any to make) against the said cross demand; to which reasons of defence, the original defendant who preferred the cross claim, is obliged to reply; and for the filing of those pleadings, the consuls are to fix terms, from three days to three days, more or less, as they shall think proper. The answers being given in, (and if the parties proceed in any other way, the proceedings are to be null and void) the parties are to take the oath of calumny and the oath to speak the truth, and make true answers to the mutual allegations of each party.

1. And in order to prove what shall be denied on either side, there shall be granted, if required, a probatory term to

the parties, the first term to be of ten days, and they may have four similar terms, but on making oath, that the fourth term is not demanded out of malice, nor for the sake of delay, and in case there should be witnesses to be produced who live at a distance, a convenient term shall be granted, in proportion to the distance of the place, where the party shall make oath that the witnesses live, and at every term the party is to have notice to be present to see the witnesses sworn which are to be produced. Otherwise they shall be sworn in his absence. These terms being expired, and publication passed at the request of the parties, the consuls will assign a day to them to hear sentence given, without its being necessary that the parties should renounce making any further allegations, and without the proceedings being null on that account, but before the publication of the said testimony or afterwards, either of the parties may produce writings, or publick instruments in their favour.

.....

CHAPTER IX.

Of challenging Witnesses.

After publication passed, neither party is permitted to allege reasons in writing against the witnesses who shall be admitted in the cause, nor is any challenging of witnesses permitted, either verbally or in writing. But if either party alleges by word of mouth that the said witnesses or some of them, are related to the party who produced them, or enemies of him against whom they are produced, or are persons notoriously of bad fame, these points remain to be determined by the consuls, who may inform their own consciences by taking advice of those who are well acquainted with the persons of the witnesses, their fame and condition.

CHAPTER X.

How sentence is given upon the demand in scriptis.

A day having been assigned by the consuls to the parties to hear sentence, the said consuls together with their register, go to the most honest and respectable merchants of the city, make them read the whole of the proceedings, and take upon them the advice of those good merchants, afterwards they do the same with the most respectable men of the seafaring profession, and take their advice. They may take in the first place the advice of the seafaring men, if it is most convenient to them. And if the opinions of the merchants and those of the seafaring men agree, they will pronounce sentence in the cause, and if they disagree, and the merchants will not come over to the opinion of the seafaring men, the consuls nevertheless give sentence agreeably to the advice of the latter, because the contracts are to be decided upon by their advice, and they are not bound (unless they please) to take the opinion of the merchants, it not being required by the privilege, but it has been their custom ever since so to do.

.....

CHAPTER XI.

Of appeals.

Whoever shall conceive himself aggrieved by the sentence of the consuls, may appeal within ten days from the publication of the same, and the said appeal is received, and remitted to the judge of appeals, together with the record of the proceedings that have been had before the consuls, in lieu of apostles or letters dismissory, in which instrument of appeal are to be alleged the errors or *gravamina*, by which the party appellant conceives himself to be aggrieved.

OPINION*

ON THE CASE OF THE

ALLUVION LAND OR BATTURE,

NEAR NEW-ORLEANS.

BY PETER S. DU PONCEAU, ESQ.

I HAVE read and considered with great attention, the opinion of Mr. P. Derbigny, on the subject of the claim of the United States to the alluvion land near New-Orleans, known under the denomination of the *Jesuits' Batture.* I have also read a printed pamphlet on the same side, entitled "*Examination of the Judgment rendered in the cause between Jean Gravier and the city of New-Orleans.*"

On the other side I have read a printed pamphlet, by Edward Livingston, Esquire, entitled "*Examination of the Title of the United States to the Land called the Batture.*" I have read also a variety of deeds, official papers, and other authentick documents relating to the subject, but not necessary to be here enumerated.

I have considered the whole, and investigated the subject with all the attention, care and industry that I am capable of, and am now proceeding to state the opinion which my researches have led me to form.

In order to come to a right understanding of this case, it must be premised, that Jean Gravier, of the city of New-Orleans is possessed of a decree of the Superior Court of the Orleans Territory, which is a Court of *dernier ressort*

* Vid. No. 7. p. 358 *ante*.

and whose decisions are not subject either to appeal or revision, by which he is declared to be in *lawful possession* of the Batture or Alluvion in question *(a)* and quieted therein against the claims of the corporation of New-Orleans, who alone at that time had or claimed an adverse possession.

The said decree not only recognizes his right of possession, but also his title to the Alluvion in controversy as incident to an adjacent estate, the title to which was not even disputed by the corporation who contended against him. *(b)*

It must be premised also, as it has been stated to me, that the said decree was carried into full execution, and the party put into actual and full possession of the said Batture by the proper officers of the said Court, and continued in the said possession for several months, until he was disturbed by the effect of the measures which the Executive thought proper to take, and which were announced by the President in his message to Congress of the 7th of March last.

Those measures were taken, as the President states, to prevent, until a decision should take place, any change *in the state of things*; which I think must be understood to mean, *in the state of the property*, not in the relative state of the parties, already fixed by a competent authority and which could not be changed but by a superior judicial decree.

Under these circumstances, I conceive that the party

(a) "It is therefore ordered, adjudged and decreed, that the petitioner be quieted in his *lawful enjoyment* of the Batture or Alluvion described in his petition against the claims and pretensions of the defendants." [See the Judgment at length, post.

(b) "The title of Bertrand Gravier, the ancestor of the plaintiff, to the tract of land on which the Fauxbourg St. Mary is situated, has not been disputed, but it has been contended that this tract was bounded by the highway: The Court, however, are of opinion, that according to the evidence exhibited and the general usage of the country, this tract of land was bounded by the river Mississippi. From an examination of the authorities, the court are of opinion that according to the Civil and Spanish laws, the right of alluvion is incident to land which is bounded by a navigable river, and that these laws must form the rule of decision in the present case."

claiming under Jean Gravier, is still to be considered as the lawful *possessor* of the land in controversy, and that his title to the property, sanctioned, as it is, by the judgment of a Supreme Court of Judicature, is to stand good against all the world, *until a better is shown.*

If I am correct in this position, the question now to be decided will be considerably narrowed; for there will remain only to be considered whether the United States have *a better title* to the contested alluvion than that which has been solemnly adjudged to be in Jean Gravier.

I have thought it necessary to make these preliminary observations, because Mr. Derbigny in his opinion has not appeared to view the subject in the same light, but has argued as much from what he conceives to be the weakness of Mr. Gravier's title as from the strength of that which he endeavours to support, which I conceive to be contrary to all the rules which the law has wisely established for similar cases.

Then, as the claim of the United States appears only to rest on the prerogative which it is alleged they derive from the French kings to claim and have all alluvion lands, it seems that it will be sufficient for me to enquire into the grounds of that supposed prerogative, to examine whether it ever existed, and if it did exist, whether it has become a prerogative of the United States; nevertheless I will not confine myself to this single point, but I shall take and consider successively all the several grounds on which Mr. Derbigny has established his opinion in favour of the national claim.

Those grounds are five, and are stated by Mr. Derbigny himself in the following words:

1st.—Alluvion on navigable rivers belonged to the king of France.

2d.—The plantation bordering on the limits of the city of New-Orleans, was sold by the king of France in 1763, when the alluvion situated in front of the land was already in being.

3d.—Between the alluvion and the land sold, lay a royal road, the same that still exists and a levee, both which were then and have still remained publick property.

4th.—The alluvion in question has never ceased to be a royal property, the enjoyment of which the French and Spanish governments at all times left to the publick, and on which they constantly hindered private individuals from encroaching.

5th.—Neither Jean Gravier nor those from whom he derived his title, ever were in possession of the alluvion, and Bertrand Gravier himself, at the time of his settling a suburb in front of his plantation, declared that he had no claim to the alluvion.

I shall consider each of these positions separately.

FIRST POSITION OF MR. DERBIGNY.

.....

"*Alluvions on Navigable Rivers belonged to the King.*"

Before we enter upon this subject we must take a cursory view of the different laws by which France was governed before the late revolution.

In the first place, there were a great variety of customs, which, like the common law of England, were founded on and grew out of the feudal system. There were the customs of provinces, of lesser districts, and even of single towns, all or most of which, in ancient times, had been feudal sovereignties. I have counted seventy-five of those customs, and I believe there were several more. Like the common law, they remained an oral and unwritten tradition until the year 1453, when Charles the VII. by an edict which was carried into execution, ordered that they should all be committed to writing and reduced to a text. It is remarkable, that this was done about the same time when Littleton wrote his elee-

brated book of *Tenures*, which from its intrinsic merit, has by universal consent become as it were the text of the English customary law.

There were however, some parts of France, particularly in the south where lay the most ancient and most flourishing provinces of the Roman empire, in which there existed no such customs, except here and there in particular districts. Those provinces were governed by the Roman civil or imperial law, and were called on that account *Pays de droit ecrit*, or countries governed by the written law, as the civil law was called in contra-distinction to the customs, which, as has been observed, had been for a long while traditional.

In the *pays coutumiers*, or provinces where the customs prevailed, the lands were held by feudal tenure, and there the maxim prevailed, "*nulle terre sans seigneur*," no land without a feudal lord. In the other parts they continued to be held *allodially*, as they were under the Roman emperors, that is in full and absolute, property, and without any kind of feudal subjection. This specie of tenure was called in French by the expressive name of *franc-aleu*, that is to say, *free allodium*, or *free tenure*.

Paramount to these several codes were the edicts and ordinances of the successive sovereigns, duly registered in the courts of parliament, and whose authority extended all over the kingdom. These controuled the customs and the imperial law, as the acts of parliament in England controul the decisions of the common law, which, with respect to them, are considered as *lex sub graviori lege*.

But in the same manner that the common law of England, notwithstanding this theoretical arrangement, has often controuled the parliamentary statutes while pretending only to expound them, so the civil law in France in many instances controuled as well the provincial customs as the edicts of the sovereigns. As it was taught in all the universities of the kingdom, while a knowledge of the edicts and customs could only be acquired by private reading or professional practice, all the lawers throughout France, necessarily became civi-

lians, and the imperial code came to be considered as a supplementary law, which from the acknowledged equity of its principles, was obligatory in all cases for which the customs and royal edicts had not expressly provided, and as the medium through which those customs and edicts in all doubtful cases were expounded and explained. The civil law, in short, was the common law of the land, and is frequently called *le droit commun*, in the works of the most eminent writers.

Such were the laws by which the kingdom of France was governed, and the manner in which they operated. I shall speak in another place of the legislative system of the colonies. And now considering the subject merely as it related to France proper, I shall examine how the law stood there with respect to the point in controversy.

On the subject of alluvions and other accessions of land by the receding of waters, the Roman law is very full, systematical and clear. It is to be found in the 20th, 21st, 22d, and 23d sections of the second book of the first title of the Institutes.

1. The 20th section *de alluvione*, defines *alluvion* land to be that which is produced by the imperceptible decrease of waters. It declares it to be by the law of nations, *jure gentium*, the property of the owner of the adjacent ground.

2. The 21st § *de vi fluminus*, relates to land which by the sudden violence or impetuosity of the waters of a river is detached from one estate and joined to another. That is declared still to belong to the owner of the estate from which it was severed.

3. The 22d § *de insulis*, relates to islands rising in the sea or in a river, and is not properly connected with our present purpose.

4. The 23d § *de alveo*, relates to the land which is formed by a river abandoning it's bed entirely, and running into a new channel. Such land is declared to belong to the owners of the adjacent estates.

We subjoin the text of the two first and of the last of the above four sections, taken from Harris's translation of the Institutes, page 7. *(c)*

These principles previous to the making of the edicts which will be presently mentioned were considered as the law throughout France, except in those places where the customs had expressly directed it otherwise.

On this as on many other points, the customs were various. Some gave alluvions to the king, others to the feudal lords, some, as for instance the custom of Normandy, adopted the rules of the civil law, while others were entirely silent on the subject, and among these was the custom of Paris, which as we shall see by and by, was the law of the colonies. The chasm was therefore supplied by the civil law, and hence we find that all the commentators on the custom, at least all that I have been able to see, lay down its principles on the subject of alluvions, as being law under the custom. Among those we distinguish Monsieur Dumoulin whose name in France is equal in veneration to that of Lord Coke in England, and who in 1539 published an excellent commentary

(c) § 20. And further—That ground which a river hath added to your estate by alluvion (i. e. by an imperceptible increase) is properly acquired by you according to the law of nations. And that is said to be added by *alluvion* which is added in a manner which renders it impossible to judge how much ground is added in the space of each moment of time.

§ 21. But, if the impetuosity of a river should sever any part of your estate, and adjoin it to that of your neighbour, it is certain that such part would still continue yours; but, if it should remain for a long time, joined to the estate of your neighbour, and the trees which accompanied it, shall have taken root in his ground, such trees seem from the time of their taking root, to be gained and acquired to his estate.

§ 23. If a river, entirely forsaking its natural channel, hath began to flow elsewhere, the first channel appertains to those who possess the land, close to the banks of it in proportion to the breadth of each man's estate next to such banks: and the new channel partakes of the nature of the river and becomes publick. And if, after some time, the river shall return to its former channel, the new channel commences to be the property of those who possess the lands contiguous to the banks of it.

on the feudal matters of the custom of Paris, and Monsieur Claude de Ferriere, professor of law in the university of Paris, who more than a century afterwards, wrote another much esteemed commentary on the said customs. See the quotations in Mr. Livingston's opinion, ante page 331.

Such was the law understood to be in France until Louis XIV. issued those three edicts of 1683, 1693, and 1710, which Mr. Derbigny has referred to in his opinion. Indeed he issued four, all nearly of the same tenour; the first of them which Mr. Derbigny takes no notice of, was made in 1668, and is mentioned in 4th Denizart, 295, No. 8, under the word *riviere*. Four successive laws to the same effect, in the short period of forty-two years, show how unpopular those edicts were and how difficult it was to carry them into execution, even in the reign of the all powerful Louis. Denizart informs us, vol. 4, page 295, No. 9, that they were modified with regard to Brittany and Languedoc, on the remonstrances of the states of those provinces, the only ones in France who enjoyed a popular representation. They were in fact, merely fiscal edicts, the object of which was to provide pecuniary resources for the most arbitrary and the most extravagant king that France ever had, and no such edict can be found at any period antecedent or subsequent to the time when those were made. Mr. Derbigny has stated very correctly the preamble and a part of the enacting clause of the edict of 1693, on which he relies as being worded the most strongly in his favour, but he has omitted the concluding part which shows in the clearest manner the intent and object for which the law was made. I shall state the whole in a few words.

The king, after declaring himself to be, by the law of the realm, (a law which had never been heard of before) the the lawful owner of the bed of navigable rivers, and consequently of all islands, mills, ferries, &c. *atterissements and accroissements* formed by the said rivers, declares that all the holders of *atterissements*, *accroissements*, ALLUVIONS and islands, shall be quieted in their possessions, that is to say,

those whose title is anterior to 1566, on paying into the treasury *one year* and all others *two years* of their income. *(d)*

It is plain then that the object of these edicts was not so much to settle or declare the law, as to supply the necessities of an extravagant king, by extorting a composition from the *bona fide* holders of property, which the existing law, notwithstanding what is said in the preambles of the edicts, clearly warranted to them. Hence they did not receive the willing assent of the nation; but were, as I shall presently show, the object of a constant struggle between the sovereign, or rather between the *fiscus* or treasury and the people.

In other respects also, those edicts were most oppressive and arbitrary, and such as any other sovereign than Louis XIV. would hardly have ventured upon. For they were a direct violation of a well settled principle in the French law, to wit, that a possession of thirty years amounts to a prescription, and is a bar against those claims of the crown, which are called *casual rights*, that is to say, those rights which accrue to the king by accident or chance, such as escheats and the like, unless before the expiration of the thirty years they have been annexed to the domain with the usual formalities. "Among us," says Ferriere, the son of the author before mentioned, and who, like him, was professor of law in the university of Paris, "the estates of the domain which are incorporated with the crown, are not subject to proscription. But those which are not so incorporated, may be prescribed for by thirty years possession. IT IS THE SAME WITH CASUAL RIGHTS OR PROFITS." *(e)* But the king in that edict of 1693, on which M. Derbigny relies, does not appear to have respected any possession, however ancient, nor any

(d) Ceux qui ont rapporté des titres de propriété et possession avant le 1er. Avril, 1566. en payant *une annee* de revenu—ceux sans titre ni possession antérieure au 1er. Avril, 1566, en payant *deux annees* de revenu. 4 Deniz. 285, No. 10. *verbo* riviere.

(e) Parmi nous, les biens du domaine incorporés à la couronne sont imprescriptibles. Mais ceux qui n'y sont pas incorporés se prescrivent par trente ans. *Item, les droits et profits casuels.* 2. Ferriere, on the Institutes, 184.

title, however solemn; for even those who could show a title or a possession anterior to 1566, more than one hundred years before the publication of the first edict, no matter how far back such title or possession went, were obliged to compound with one year of their income.

Such are the principal features of these royal acts, on which the United States are called upon to found a claim to an estate which has been solemnly adjudged to a citizen by a decree of a competent court. Acts indeed of the most tyrannical kind; and from which the mind of a free American shrinks with disgust.

The lawyers of France saw them in their proper light, and although they could not get rid of them altogether, as the king's edicts had, undoubtedly, in France, the force and effect of laws, yet, they gave them as strict a construction as they could possibly admit of.

It is to be observed that the word alluvion is not to be found in any of those edicts, except in that of 1693, nor even in that is it used in that part of the act in which the king states what is the law of the realm. The only words used are *cre'ment* or *accroissement* and *atterissement*, which being of a vague and uncertain meaning afford sufficient room for legal construction. Those were defined to mean, not *alluvions* properly so called, but those other species of *accessions* which are the subject of the 21st and 23d sections of Justinian's Institutes above mentioned. *Accroissement* in the sense of the edicts, was defined to be land which is suddenly transported from one place to another by the violence of the waters of a river; and *atterissement* the land which is left uncovered when a river suddenly changes its bed altogether, and opens to itself an entire new channel.

"There is then" says the younger Ferriere, in his commentaries on the 21st § of the Institutes, *de vi fluminis*, "a difference between *an alluvion* and *an accroissement*, made by the violence of the waters." After explaining that difference and the reason thereof, he proceeds thus: "By our French law, when those *accroissements* which have been

made suddenly are considerable, *it is pretended* that they must belong to the king, as a kind of waif or direlict, *which appears conformable* to the royal ordinances by which the islands and *atterissements* which are found in navigable rivers belong to the king." *(f)*

How unpalatable these edicts were to the French Jurists appears sufficiently from the language of this writer, who states the king's claim to *accroissements*, in their narrow legal sense as a mere pretension of the government, which he however reluctantly acknowledges to be conformable to the royal ordinances.

Commenting on the 23d § of the Institutes *de alveo fluminis*, this author proceeds to define the word *atterissement*.

" We call in our French law *atterissement* the *channel and bed* which a river has quitted. These belong to the king," &c. *(g)* In his dictionary of jurisprudence, verbo *atterissement*, he says, *the channel and bed which a river has suddenly quitted*—(tout d'un coup abandonné.) And it must be observed that he refers to and is commenting on a text of the Roman law, which relates only to the case of a river *changing its bed altogether*. Therefore there can be no doubt about his meaning.

But when he comes to speak of alluvions properly so called, when commenting on the 20th § of the Institutes, by which it will be remembered they are declared to belong to the owners of the adjacent soil, his language is as clear and full as it is short, and he states the French law, that is to say,

(f) Il y a donc de la difference entre *l'alluvion* et L'ACCROISSEMENT fait par la violence des eaux. Par notre droit Français quand ces accroissemens qui se sont faits tout à coup sont considérables, on pretend qu'ils doivent appartenir au roi comme un espèce d'epave—ce qui parait conforme aux ordonnances royaux, par lesquels les isles et *atterissemens* qui se forment dans les grands fleuves appartiennent au roi. 2 Ferriere on the Institutes, 52.

(g) Droit Francais—Nous appellons *atterissement* le canal et le lit qui la riviere a d'un coup quitté. 2 Ferriere on the Institutes, 52.

the general practical law of the land, the *Jus Gallicum*, as contra-distinguished from the Roman law on which he is commenting, and from particular customs, in these few words: "FRENCH LAW—The disposition of this section is observed among us" *(h)*

The expression of this professor is peculiarly remarkable, because he not only states his opinion of what the law ought to be, but his knowledge of *what it is in practice.* "THE DISPOSITION OF THIS ARTICLE IS OBSERVED AMONG US."

Such then, if we are to credit this eminent professor, was not only the opinion of the learned in France, at the time when he wrote these excellent commentaries, which he published in the year 1768, just before the possession of Louisiana was delivered to the king of Spain, but the doctrine admitted and recognised by courts of justice. *Atterissement* and *accroissement* were given to the king, to satisfy the words of the edicts, but *alluvion* properly so called, was held to belong to the subject.

On this point, that alluvions proper, are not included within the legal meaning of the edict, as accessions belonging to the sovereign, but remain as they were at the civil law, except in districts where the customs had expressly provided otherwise, all the French authors of respectability whose works I have had an opportunity to peruse (one only excepted, Mr. Pothier, of whom I shall speak presently) fully and most unequivocally agree. Were I disposed to swell this opinion with names and quotations it might easily be done; but besides Ferriere already quoted, I need only mention Denizart, Renusson, Guyot, Henrys, Argentré and others whose works are quoted or referred to in Mr. Livingston's pamphlet, and to whose respectable names many others might be added of equal authority. The same doctrine is laid down in all the abridgements and dictionaries of the French law, in that immense work, the Repertory, in De-

(h) Droit Francais—La disposition de cet § est observée parmi nous. 2 Ferriere on the Institutes, 45.

"This law," (the second title of the second book of the civil code) "*puts an end to the great question of alluvions.* It decides according to the principles of the Roman law. The principles of feudality had involved this matter in obscurity, it had been *pretended* that alluvions, formed by navigable rivers, belonged to the sovereign, and those formed by rivers not navigable to the feudal lords. The owners of adjacent estates were put aside by most of the customs."

"In the provinces governed by the Roman law, those owners had however maintained their rights, but it was attempted to despoil them thereof a few years before the revolution; the solemn reclamations of the late Parliament of Bordeaux on this subject are well known: that body repelled with as much courage as learning the attempts of the treasury, and the ambitious intrigues of some courtiers, to whom the treasury lent its name."

"It was SETTLED at that period, that alluvions must belong to the riparious owner, according to this natural maxim, that the profit belongs to him who is exposed to suffer the damage, with which riparious property is threatened, more than any other.

"The feudal system has disappeared; it can therefore no longer present an obstacle to the rights of the riparious owners." *(i)*

(i) "Le projet de la loi termine la grande question des alluvions, et decide conformement ou droit Romain que l'alluvion, &c.

"Les principes de la féodalité avaient obscurci cette matiére; on avaite eté jusqu'à pretendre que les alluvions formées par les fleuves et riviéres appartenaient au Prince, lorsqu'il s'agissait d'une riviére ou d'un fleuve navigable, ou au seigneur haut justicier, lorsqu'il s'agissait d'une riviére ou d'un fleuve non navigable. Les propriétaires riverains étaient entiérement écartes par la plupart des coutumes.

"Dans les pays du droit écrit, ces propriétaires s'étaient pourtant maintenus dans leurs drois, mais on voulut les en dépouiller peu d'années avant la révolution; et l'on connait à cet égard des réclamations solemnelles de l'ancien parlement de Bourdeaux, qui repoussa avec autant de lumiéres que de courage les entreprises du fisc et les intrigues ambitieuses de quelques courtisans dont le fisc n'était que le prête nom.

If this statement be correct, what can now signify the opinion of M. Pothier, on which M. Derbigny so much relies. M. Pothier is certainly a writer of great eminence; his opinions are entitled to a considerable weight, and he lays it down in the most unqualified manner, that alluvions in France belonged to the king. But amidst such a struggle between the crown and the subject, as has been shown to have existed, is it not naturally to be expected that some writer will be found to support the claim of royal prerogative? And if that writer should stand alone, amidst an host of learned jurists, on what principle is his single opinion to prevail?

It may be moreover observed, that M. Pothier resided at Orleans, in a district governed by a particular custom, which I have not now before me, but which possibly was one of that greatest number, which entirely excluded the riparious proprietor. If by the custom of Orleans, alluvions were vested in the sovereign, a natural prejudice in favour of his own local law, may have induced M. Pothier to extend its principles on the subject of alluvions to the whole kingdom. Thus a M. *Bourjon* quoted by *Denizart*, maintained the opinion that alluvions belonged to the lords of manors, and so probably it was by the custom of the country in which he lived. But, says *Denizart*, neither M. *Bourjon's* opinion, nor that of the authors which he quotes are *followed in practice*. See ante page 330.

But there must be an end to every discussion on this subject, since the law of France has been settled in this particular by the solemn decision of the parliament of Bordeaux, which M. Portalis mentions, and, as I am informed, by the

"Il fut établi à cette époque, que les alluvions devaient appartenir au propriétaire riverain, par cette maxime naturelle que le profit apartient à celui qui est exposé à souffrir le dommage, dont les propriétés riveraines sont menacées plus qu'aucune autre.

"De systême féodal a disparu, conséquemment il ne peut plus faire obstacle au droit des riverains." *3me. Code Civil avec les Discours, &c.* 49.

Parliament of Paris, to whom the case was referred for revision. And although France at that time was no longer in possession of Louisiana, yet on the subject of a construction of a French law, the solemn opinion of a supreme bench of French judges, is the best evidence that can be obtained, and the United States would hardly claim rights under a French edict which the French courts, construing the same edict, denied their own sovereign to possess.

I now proceed to M. Derbigny's second position.

SECOND POSITION OF MR. DERBIGNY.

.....

The Plantation bordering on the limits of the city of New-Orleans, was sold by the king of France in 1763, *when the alluvion situate in front of the land was already in being.*

The testimonial proofs of this fact, says Mr. Derbigny, are such as to leave no doubt. I have not seen nor heard the proofs on which M. Derbigny relies, but however respectable his witnesses may be, and however pointedly they may speak, they are at least contradicted by the testimony of Mr. *Laveau Trudeau*, who, I understand was surveyor general of the province of Louisiana under the king of Spain, and is now recorder of the city of New-Orleans. He says, see ante page 352, "*that he recollects that at the time of the sale of the Jesuit's property* (which was in that very year 1763) *vessels came to the levee opposite Madame Delor's, and that there was then* NO BATTURE *from thence to the city.*"

On this point, then, taking together *Mr. Livingston's* and Mr. *Derbigny's* statements, it appears, not that the proof is perfectly clear on either side, but that there is contradictory testimony, which it is not my province to reconcile,

But I am willing, for the sake of argument, to take the fact for granted that there existed a batture or alluvion in the year 1763. The question then only is what inference is to be drawn from it?

I take M. Derbigny's inference to be, though rather obscurely expressed, that if that batture or alluvion existed in the year 1763, while the king of France was in possession of Louisiana, his title to it became vested under the edicts above mentioned. *(k)*

There can be no doubt that if there existed an alluvion near New-Orleans in the year 1763, and if the king of France was entitled by law to all alluvions *there*, that his title was vested from the moment that an alluvion came to exist, liable, however, to be defeated, as we have already shown, by an adverse possession of thirty years, unless within that time the property should be annexed to the domains of the crown by a judicial proceeding in nature of our *inquest of office*.

But Mr. Derbigny takes it here for granted that his first proposition is incontestible, the contrary of which I hope I have sufficiently shown. And were it even otherwise, I think it was not sufficient for Mr. Derbigny to have shown that the king was entitled to the alluvions of navigable rivers in *France*, he ought to have proved also that he had a right to them in *Louisiana*. For because a certain law may exist in the mother country, it does not necessarily follow that it is in force in the colonies or in a particular colony. Many of the statutes of Great Britain have never been considered as in force here, merely because they were not suited to our colonial situation. "It has been held," says Blackstone, "that if an uninhabited country be discovered and planted

(k) Mr. Derbigny's words are: "Therefore considering that batture as an alluvion formed on a navigable river, without reference to any other circumstance, we may apply to it the expressions of the royal edicts above cited, and the authority of Pothier, to establish that alluvion or accretion belonged to the king of France."

by English subjects, all the English laws then in being, which are the birth right of every subject, are immediately there in force. But this must be understood with many and very great restrictions. Such colonists carry with them only so much of English law as is applicable to their own situation, and the condition of an infant colony; such for instance as the general rules of inheritance and of protection from personal injuries." 1 Blacks. Com. 107.

This principle is very reasonable; it is founded on the plain dictates of common sense and natural justice. And as Mr. Derbigny will not deny that the French are a sensible and intelligent nation, he must also presume that they have not excluded common sense from their colonial legislation.

The custom of Paris, it is well known, is the general law of the French colonies. But it does not follow that every part of that custom is actually in force there; those parts which are inapplicable to the situation of each colony necessarily lose their power. Mr. Moreau de St. Mery tells us so expressly. He collected before the late revolution all the law of St. Domingo in six quarto volumes, and when he comes to the custom of Paris, he tells his readers that as it is easy to be procured with excellent commentaries, he thinks it needless to insert it at large; but, continues he, *I shall speak elsewhere of the dispositions of that custom, which are inapplicable to the colonies.* (l)

So the general laws and ordinances of the kingdom of France are also the law of the French colonies, but this is, as Blackstone says, to be understood "*with many and very great restrictions.*" The same reason which applies this principle to the custom of Paris, will apply it likewise to the ordinances of the kings; this is too clear to need illustration.

But it will perhaps be expected that we should prove the negative proposition that the edicts in question were not in

(l) "Nous parlerons ailleurs des dispositions de cette coutume, qui sont inapplicables aux colonies." 1 St. Mery, 11.

force in the French colonies. It is always a difficult task to prove a negative; we shall however attempt it.

1st—It is a well known fact that the feudel system was not known nor exercised in any of the French colonies except Canada. Those parts of the custom of Paris which M. de St. Mery tells us were inapplicable to the situation of the West-India colonies, were undoubtedly those parts which were connected with feudality, though as that gentleman never completed the original plan of his work, he has not explained himself in this particular. In Louisiana every body knows that feudality never was established. "There are," says the author of the communications which the President laid before congress with his message of the 21st of October 1803, "there are (in Louisiana) *no feudal rights nor noblesse.*" President's mess. p. 30.

Now if, as Mr. Portalis tells us, the pretensions of Louis XIV. to alluvions were feudal claims or rights, and if no feudal rights ever existed in Louisiana, it follows, in my opinion that claims or rights of that description were excluded.

"By the law of my kingdom," says Louis XIV. "I am entitled to such rights;" that is, as Mr. Portalis explains it, by the feudal law, which is the law of my kingdom: but if the feudal law was not the law of Louisiana, the king could claim no such rights there.

2d—M. Moreau de St. Mery has inserted in his collection, which I have already mentioned, not only the laws and ordinances peculiarly relating to the colony of St. Domingo, but the edicts and general ordinances of France, which at the time when he wrote (after Canada had ceased to belong to that kingdom) were considered as being in force in the French colonies, generally, beginning with the year 1550 (long before Louisiana or St. Domingo began to be settled by the French) down to the year 1785. But in that extensive collection no mention is made, and no trace whatever is found of any of the edicts in question, and they would undoubtedly have been inserted in the work, had they been considered as a part of the law of the colonies.

3d—When Louis XV. or rather the Regent in his name, in 1717, granted Louisiana to the *Compagnie d'Occident*, he gave it to them (art. 5) in full property and dominion *(en toute propriete, seigneurie et justice)* not reserving to himself ANY RIGHTS OR DUTIES *(aucuns droits ni devoirs)* except fidelity and liege homage, which are the duties that every subject owes to his sovereign. The company kept it until 1731, when they gave it back to the king—1 Valin, 408. During that period, at least, he enjoyed no feudal rights whatever in that colony, and the edicts in question could not be in force there.

4th—By the 8th article of the same charter, Louis XV. authorised the West-India company, to grant the lands in Louisiana in such manner as they should think proper, even to be held in *franc-aleu* or *allodium (m)* that is, as Blackstone defines it, "*by a tenure wholly independent, and held of no superior at all.*" 2 Blacks. Com. 47. "A kind of tenure," says the same author, "which is property in the highest degree, and of which the owner is said to be seized *absolutely in his own demesne.*" Ibid 105. "A tenure which existed in the Roman provinces before the feudal system was introduced there." Ibid 47. And lastly, "A tenure not known in England, because all lands there are held mediately or immediately of the king." Ibid 60, 105. *(n)* The company held the province under this charter from 1717 to 1731, a period of fourteen years, and I believe it was held before that on the same terms by former grantees. During that time they must have granted a great proportion of the lands of the province, particularly on the banks of the Mississippi, where the settlements were first made, and it does not appear that any of the lands which they sold or gave

(m) Pourvu ladite compagnie aliéner les terres de se concession; même les accorder en *franc-aleu*, sans justice ni seigneurie. West-India Comp. Charter, art. 8.

(n) This allodial property no subject in England has, it being a received and now undeniable principle in the law, that all the lands in England are held mediately or immediately of the king.

away, were granted otherwise than *allodially*, as *those* which they granted *in one thousand seven hundred and twenty six* to the Jesuits, under which title we are seized, confessedly were. *(o)* If so, the very terms of all the ancient grants under which the inhabitants hold, excluded *feudal rights* of every kind, and consequently excluded the *feudal right of alluvion*, if such existed. It will be recollected that Mr. Portalis expressly states that the inhabitants of those parts of France which were governed by the Roman law, and where lands of course were held *in allodium* or *franc-aleu*, maintained their rights to alluvions against the attempts of the officers of the treasury to enforce the king's pretensions among them. Because undoubtedly it was considered that it is the very nature and essence of *allodium*, not to be subject to any feudal rights or claims of any description.

5th—It does not appear that the edicts in question, or any of them, were ever enforced or attempted to be enforced in Louisiana, or that either the French or Spanish governments ever claimed a right to have the alluvions of the Mississippi. I leave the case of this *batture* out of the question, because I shall speak of it in its proper place. But it does not appear that any other person, except John Gravier, or those claiming under him were ever molested or *disturbed in the enjoyment of an alluvion.*

6th—No reservation of a right of alluvion appears to have been made in any of the French grants, although it is well known that they are very particular in all their writings, and particularly in the grants of their government, in expressing whatever they wish to be reserved. The St. Domingo grants that I have seen are full of conditions and reservations. Mr. Derbigny himself states under his third head, ante page 301, that the royal grants of land in Louisiana were drawn up in the same careful manner; "*those grants*" says he, "*expressed that the grantee was to fulfil* CERTAIN CONDI-

(o) See the proceedings on the sale of the Jesuit's land, ante page 343.

TIONS, *and* AMONGST OTHERS, *that of making a publick road on his land.*" It is probable that the alluvion right would have been expressly reserved had it existed.

If I have sufficiently proved that the edicts in question were no part of the law of Louisiana, it is of no consequence whatever whether there was or not an alluvion in the year 1763. But the fact does not appear proved, or if proved, is contradicted by other testimony.

Unless, however, it is clearly proved that there existed a batture or alluvion at that period, or at least at the time when Spain took possession of the country and promulgated the Spanish laws, which was in the year 1769, all the arguments drawn from the French law must fall to the ground, and the Spanish alone becomes the rule of decision, and as it is admitted that by the Spanish law, there is no such right of alluvion in the sovereign as is now claimed, there is an end to the whole controversy.

But I shall proceed to consider the case on the supposition that a batture existed, and that the law of Louisiana as it was previous to 1769 is to be the rule of decision.

THIRD POSITION OF MR. DERBIGNY.

.....

"*That between the Alluvion and the Land lay a Royal Road, the same that still exists, and a Levee, both of which were then, and have still remained publick property.*"

Before I proceed to observe on this third position, I must take notice of an authority which Mr. Derbigny has referred to, under the first head of his argument, the examination of which will, I think, properly introduce the discussion of the point now before us.

Mr. Derbigny presuming that M. Denizart was the only French author whose opinion was contrary to that of M. Pothier, on the subject of the right to alluvions, and not attending to the host of respectable writers, all of whom have maintained the same ground with M. Denizart, while M. Pothier appears to have stood alone on his side of the question; thought that he could reconcile the opposite opinions of these two writers by a loose dictum of M. Lerasle, one of the compilers of the French encyclopædia.

This M. Lerasle, of whom nothing is known but that he was hired by the booksellers to compile the legal section of the new encyclopædia, and who, of course, is a very unfit person to reconcile two such men as M. Ferriere and M. Pothier, merely says: "That alluvions by the law of France, belong to the owners of the adjacent estates, when such estates are immediately bounded by the river, but if they have for their boundary an intervening causeway or road, then the alluvions belong to the king."

In the first place it cannot be denied that if an estate be not immediately bounded by a river, but by some thing else, lying between the estate and the river, whether that something be a causeway, a road, or any other modification of real property, the alluvions cannot belong to the owner of the estate, because it is not adjacent to the river, and he is not then what the law calls a *riparious proprietor.*

Secondly—If the intervening causeway or road is publick property and belongs to the sovereign, it is clear also that the sovereign is alone entitled to the alluvions, not by virtue of any edict or prerogative, but simply because his property, the causeway or road, lies contiguous to the river, and therefore he is in fact the *riparious owner.* Thus on the banks of the Loire, in France, there is a royal levee or embankment, which serves also as a publick road. The soil on which the levee is made belongs to the sovereign: it was raised and is kept in repair at the publick expense. Those therefore whose estates lie contiguous to it have no right to claim the alluvions of the river, from which their property

is separated by that fine monument of human industry. But if on the contrary, a man possesses property lying on the banks of a river, under the obligation of keeping a publick road open as near as possible to the water side, such obligation does not take away from him his right of property in the soil through which the road is made to pass, it is only a *charge* or *servitude* upon his estate, and however the publick may have a right to the use of the road, the property can never be said to be out of him. Thus by the French ordinance of 1669, the owners of lands bordering on navigable rivers, are obliged to leave open along the banks, the width of twenty-four feet at least, for a royal road and draught of horses, and they are forbidden to plant trees or fence in their property nearer to the bank than thirty feet on the side on which the boats are hauled or drawn, and ten feet on the other side, under the penalty of a fine of 5000 livres, and confiscation of the trees or inclosures. *(p)*

It is clear that this law considers the property of the soil of the road to be in the owner of the riparious estate, otherwise, it would not have directed in case of contravention, the *confiscation of the trees* which should be planted on the said road. Trees while in the ground, being considered in France as well as in England and America, as immovable or real property, and as a part of the soil in which they grow. And again, if the obligation to make such a road had been considered as vesting the soil of it in the king or government, there would have been an end in France to the question concerning *alluvions*, because as there must be such a road all along the banks on each side of every navigable river, the property of the soil of those roads being in the king, the

(p) "Les propriétaires des héritages aboutissants aux rivières navigables, doivent de long des bords vingt-quatre pieds de place au moins en largeur pour chemin royal et trait de chevaux, sans qu'ils puissent planter arbres ni clôture ou haye plus près que trente pieds du côté où les bateaux se tirent, et dix pieds de l'autre bord à peine de 5000 livres d'amende, confiscation des arbres, &c. C'est la disposition de l'article 7, du titre 28 de l'ordonnance de 1669." 4 Deniz. 296, No. 18 *verbo* Rivière.

alluvions would have followed of course as there would not have been in France any riparious owner but the monarch himself.

Mr. Derbigny has been well aware of this distinction, for he does not rest his argument on the mere fact of there being a royal road and levee, but he adds that the said road and levee *were and continued to be publick property.* Neither does he pretend that this property was vested in the sovereign by virtue of a general law applying to every estate bordering on the Mississippi, nor by virtue of a general clause inserted in all the patents for similar estates, but by virtue of what he conceives to be an implied reservation in the deed which was made of the Jesuit's land to the person or persons through whom the Graviers became seized of the property. This is what we are going to consider.

In the first place it is admitted by Mr. Derbigny, that there was in Louisiana, probably from the first settlement of the colony, either a law or an usage, similar in substance or in effect to the French edict of 1669 above mentioned, by which the proprietors on the river side, were obliged to open a publick road near the river, and that *that* obligation was expressed as a condition in all the grants of land bordering on the Mississippi. In addition to that, each land holder was bound to raise an embankment or levee to prevent inundations, and to keep both the levee and the road in repair. Whether these obligations were imposed by custom or by a positive written law, is indifferent, because such a general and ancient custom must have been equally binding on the inhabitants as a statute or ordinance would have been.

It is probable that the idea was taken from the French ordinance, or perhaps, that the ordinance itself was extended in practice to the colony of Louisiana, with such modifications as were considered to be suited to the localities.

However this may be, nothing can be clearer than that the king of France did not reserve to himself the soil of the road, which the proprietors of land on the Mississippi were obliged to open and keep in repair on their estates. The

very circumstances of their being obliged to repair the road as well as the levee or bank, is a proof that the soil was considered as their property, and it is in proof from Mr. Derbigny's own acknowledgment. See ante page 301. that the holders of land would sometimes stop up the old road and open a new one, "for," says he "*; provided there were a road convenient to the river the grantee fulfilled his promise.*" The original grants therefore contained only a promise or covenant on the part of the grantees that a road should be kept open near the water on the premises, not a reservation by the king of any part of the soil for that purpose.

If the king or the West-India company, who were his grantees of the whole province, made no such reservations in their concessions or grants, it follows that the estates of the original proprietors of land on the Mississippi were bounded by the river and extended quite to its banks. This is not denied by Mr. Derbigny, neither does he deny that the property now covered by the suburb of St. Mary, while held by the Jesuits, under the grant made to them by the West-India company, had the same boundary with other estates held under similar grants, that is to say, that it was bounded by the river.

But in the year 1763, the order of Jesuits having been abolished in France, a judicial proceeding was instituted at New-Orleans, in the supreme court of the province, for the purpose of condemning their estates as confiscated to the crown.. It appears by the authentic documents (which are inserted ante, notes A. C. page 343, 349) that this proceeding was instituted on the petition of the king's attorney *(sur la requete du procureur general du roi)* and that on the 9th of July, 1763, the court pronounced an *arret* or decree, by which they ordered all the estate and property real and personal *(tous les biens meubles et immeubles)* which belonged to the Jesuits, to be judicially sold (judiciarement vendus.) The sale was not, as with us, made out of court by a ministerial officer, but at the bar of the said court, in the presence of one of the judges thereof, and of the king's attorney, be-

fore whom the property was put up for sale by the court crier, the bids received and recorded, and the adjudication decreed to the highest bidder, and this decree of adjudication became the purchaser's title, without any other deed or conveyance being required.

The decree, therefore, which declared the Jesuits' property to be confiscated and ordered the sale thereof, made no kind of exception or reservation, but *all their property and estate, real and personal*, was directed to be sold to the highest bidder.

This circumstance is particularly mentioned because it is well known to all those who are conversant in the French system of law, that the attorney general, who was the mover of these proceedings, and who was present throughout the whole transaction, is officially bound in all cases to take notice of and to preserve the rights of the sovereign, wherever they may be concerned. It is more than presumable that if it had been the intention of the government to have reserved to itself the soil of the road in question, he would have taken care to have had that reservation expressly inserted in the decree. For that soil, it must be again observed, was *part* of the property of the Jesuits, and unless specially excepted, must be taken to have been ordered to be sold with the remainder of their estate.

Let us now see how this decree was carried into execution.

After the said decree directing the sale of the Jesuits' property had been given, the surveyor general was ordered to inspect all the title deeds and papers of that order, and to survey their lands, and in the report or return which the said surveyor made of his proceedings under the said order, he stated: "That, according to the said title deeds, papers, plan and official surveys, he had found that the said land ought to contain *thirty two arpents of front on the river St. Louis*" (trente-deux arpents de face sur la fleuve St. Louis." See the official copy of the said report now before me; see Mr. Livingston's ante page 345.

This survey was made on the 14th and returned on the 22d of July, 1763, after which the court proceeded to the sale of the property in six different lots; and in the decree of adjudication of each lot, the property sold was described as follows:

"A piece of land having ——— arpents *in front* on the usual depth of 40 arpents, situate on the other side of the river, with its *circumstances (q)* and dependencies, without retaining nor reserving any thing, from top to bottom, such as the whole now is and exists." *(r)*

This decree recited that the sale was made in pursuance of the prior decree of the same court, directing the sale of all the real and personal property of the Jesuits.

Mr. Derbigny now pretends that under these proceedings the whole of the front of the Jesuits' property was not sold, but that there was an implied reservation of the road and levee, and the following are his arguments.

First—That the reservation must be understood, because in the report of survey above mentioned, and in the decree of adjudication, the river is not expressly called for as the boundary of the land.

Our answer is that the front boundary of this estate is described precisely in the same manner as the front boundary of all other lands bounded by the river, used to be in the colony of Louisiana.

We have the testimony of M. Lafon now deputy surveyor of the United States for the county of Orleans, ante 354,

(q) This word is very material—It means, says Ferriere, Dictionaire de Droit, *hoc verbo*, all that is *adjacent* or *accessory* to a house or piece of land; *tout ce qui est* ADJACENT *ou accessoire à une maison, à une terre ou à une seigneurie.* The word *adjacent*, is synonimous to *contiguous*, and the word *accessory*, from the Latin *accedere*, to approach, means the same thing.

(r) "Une terre ayant——arpents de face sur la profondeur ordinaire de 40 arpents—située de l'autre bord du fleuve—circonstances et dépendances, sans en rien reserver ni retenir—de fond on comble—tel et ainsi que le tout se poursuit et comporte. See ante page 349.

and of the two Messrs Trudeau's, ante page 351, that they have never seen any concession or grant, either under the French or Spanish governments, which was not bounded by the river itself, and that all those concessions or grants, in order to designate such boundary, use these expressions, "*so many acres in front* (de face) *or so many acres of front to the river* (face au fleuve.)

Now it happens precisely that this decree of adjudication uses the very words "so many acres in front" (de face) while the report of survey on which it is founded makes use of the still more pointed expression of "*front on the river*" (face au fleuve) and the prior decree which is the foundation of the whole, designates *all the property* of the Jesuits as the object of the sale.

It is true, that none of these expressions convey in common parlance, the precise idea that the land is immediately bounded by the water's edge, but it is true that they do not negative that idea, and as they appear to be *technical expressions* which have been used in all grants, and the effect of which have ever been to convey the property in the land quite to the margin of the river, I do not see any reason why they should be denied here the legal meaning and effect which they have received, and are to receive in all other cases.

M. Derbigny criticises on the verbal meaning of these words, and takes great pains to prove that because a plantation is said to have *its front on the river*, it does not necessarily follow that it has the river for its actual boundary. I am not prepared to enter into this discussion. This is not a question of grammatical criticism; the words which are commonly used in legal proceedings, must be taken to have a fixed technical meaning, even though they should in common parlance, negative the very idea of the effect which the law gives them. The only question to be asked is, *what effect* does the law give to these words in all other cases? and the answer must apply to the case before us, unless there should be something peculiar in it to distinguish it from all others.

M. Derbigny, however, thinks that he has found such a distinguishing peculiarity in this case. He tells us that there is a great difference between a free grant or concession and a sale. That when this property was originally granted by the government of France, it was wild and uncultivated land, but that at the time of the sale under the decree, it had become valuable by the industry of man, and that there was then on it both a road and a levee. This is certainly true, but what does it prove? why, that when this land was wild and uncultivated, the king gave it away, and that now that it is become of value, he no longer gives it, but sells it for a valuable consideration. But it has absolutely nothing to do with the construction of a technical expression in the deed of sale.

M. Derbigny does not pretend to say that there existed at that time a *valuable alluvion*, and that as it is not expressly mentioned in the deed, it must be presumed to have been reserved. Were it even so, this consequence would by no means follow; but far from there being then a *valuable* alluvion, it is left in doubt at least, whether there was any alluvion at all. And as to the value of such property, it is a well known fact that these alluvion lands were absolutely worth nothing until after the cession. American industry and American enterprize set a value upon them, without which this controversy never would have taken place.

Secondly—M. Derbigny observes that there is no condition expressed in this deed of sale imposing on the purchaser the duty of keeping the road in repair, that therefore the soil of it must be presumed to have been reserved, for, says he, it would otherwise follow, that the purchaser might convert that road to his private use, without being obliged to supply another in the place of it.

I answer, that this consequence would by no means follow, for although the deed does not expressly impose such a condition on the purchaser, yet the law clearly does, and as he took the Jesuit's property as the Jesuits had it, and with an express reference to their title contained and specified in the

return of survey, he therefore undoubtedly took it charged with all the burdens which had been imposed upon them. That it was so understood in Louisiana, under the Spanish government, clearly appears from the Baron de Carondelet's letter to M. Gravier, of the 10th of March 1794, in which he gives him orders to repair the levee, and commends his former punctuality. Vide ante page 348.

The last argument of M. Derbigny which I shall take notice of under this head, is a criticism on some expressions contained in the return of warrant of survey above mentioned, from which he would infer an intended reservation of the soil of the road and levee.

It will be recollected that the surveyor general expressly says: That having examined the evidence of the title of the Jesuits, he found that they ought to have thirty-two arpents *of front on the Mississippi;* after stating thus much, instead, as is usual with us, of giving in a short description of the premises, the result of his survey, he proceeds according to the French custom to give an exact account of the mechanical operations by means of which he performed the survey which he was directed to make, and in the course of his relation, he says: That having examined the title deeds, &c. he began his operations, and drove in a stake at the distance of six toises five feet from the middle of the levee, from whence he took and measured the different courses. M. Derbigny pretends that this was done for the purpose of designating the front boundary of the estate, and therefore that it did not extend further towards the river than the place where the stake was driven in.

But M. Lafon and M. Charles Trudeau, both inform us, that this mode of operating never was intended to designate the boundary of the plantation on the side of the river; and that the usual manner of measuring such plantations, is by drawing a parallel line, as near as possible to the river, or by a perpendicular one on the sides, but that this line never designates the front limits of the plantation. And that the landmarks which are placed in the beginnings of the said

lines are intended only to show the directions which those lines ought to have. See pages 351-2-3, ante.

This matter being thus explained, every argument drawn from it in favour of the United States' claim must fall to the ground.

FOURTH POSITION OF M. DERBIGNY.

.....

"*The Alluvion in question has never ceased to be a Royal property, the enjoyment of which the French and Spanish governments at all times left to the publick, and on which they constantly hindered private persons from encroaching.*

This proposition is afterwards stated by M. Derbigny in other terms, to wit:

"*That the batture never ceased to be considered as a part of the royal demesne, and that to the time of the retrocession, the king of Spain never ceased to act as its proprietor.*"

I shall proceed to consider the allegations and test them by the facts that are in proof before me.

If the batture has never ceased to be a part of the royal demesne, there must exist some decree of a court of justice, or at least some edict or other publick act annexing it to the property of the crown.—We have already shown that by the French law, if there be no such formal annexation, the right of the king to such casual accessions of property is barred by an adverse possession of thirty years. If then it had been the intention of the government that the alluvions of the Mississippi should be considered as publick property, some such act would, it seems, have been necessary, if not to comply with the law, at least, to give notice to the inhabitants. We do not however merely rely as to this point on the general law of France, but on an edict, made expressly

for the colonies, which is much more pointed and which appears to leave no kind of doubt on the subject. We refer to an ordinance of Louis XV. made on the 17th of July, 1743, while Louisiana was fully in the possession and under the dominion of France. This ordinance is entitled "*A declaration of the king concerning grants of land in the French colonies*," and is to be found at large in M. St. Mery's collection, vol. 3, page 745. By the 5th article of this ordinance it is expressly provided that *all annexations of property* to the domain of the crown which shall not be judicially decreed, shall be null and void and of no effect. *(s)*

This ordinance appears to have been made for the purpose of protecting the subject in colonies so distant from the seat of government, and to prevent their being deprived of their property by acts of arbitrary power. I may therefore with propriety ask of those who support the claims of the United States, to produce the judicial act or decree by which these alluvions or any part thereof have been declared to be annexed to the demesnes of the crown.

Those who are not intimately acquainted with the details of the organization of the government of France and its colonies previous to the late revolution may perhaps imagine that those edicts were a mere dead letter, and that arbitrary acts supplied the place of law in almost every case. But let it be recollected that although the order of Jesuits had been abolished in France, and their property declared to be confiscated, yet the government of Louisiana did not venture to proceed to the sale of their estates in that province, without having previously instituted a regular suit and obtained a formal decree from the highest judicial tribunal in the colony.

The only governmental acts which are adduced in support of the allegation that the batture never ceased to be consid-

(s) "Art. 5. Déclarons nulles et de nul effet toutes concessions qui ne seront pas faites conjointement par le gouverneur et l'intendant, *comme aussi toutes reunions qui ne seront pas prononces.*

ered as a part of the demesne of the crown are a proclamation of the governor of Louisiana issued in or subsequent to 1794, by which he ordered certain buildings to be pulled down, which strangers had erected on that spot, and the repairs which about that time he caused to be made to the levee after M. Gravier had refused to repair it himself. But these facts, even admitting them to be true in their greatest extent, and without any possible qualification, are very far from proving M. Derbigny's broad proposition, that the batture *never ceased* to be considered as royal property; for, at any rate a single act of power can never be considered as an evidence of title. But the very circumstance under which this was done proves the contrary; for if the batture had always been considered as publick property, there was no necessity for the governor's applying to M. Gravier to repair the levee in the first instance, which was an acknowledgment of his right of property. But it is not all, we have it in proof from the testimony of Messrs. Laroche and Segur (vide ante p. 357–8) that Segur having contracted with the Baron de Carondelet, the same governor who issued the proclamation, for the supply of masts for the royal navy, and having requested him to point out a place where he could deposit the said masts, the Baron directed him to ask Gravier's *permission* to lay them on *his* batture.

Let these facts then which appear to have all happened about the same time, to be taken together, as they ought to be, and let any one say whether they support the proposition which M. Derbigny lays down in so broad and so unqualified a manner. Nay, the governor's acknowledgment of M. Gravier's right to the batture, which is in direct proof by his written order to him to repair the levee, leads us, necessarily to the conclusion that the proclamation ordering the buildings to be thrown down (the text of which we are not in possession of) was dictated from some considerations of local police, and was not at all meant an assertion of the title of the government to the property in question.

I shall say nothing of the answer of the auditor Vidal to the person who applied to him to establish a brick-kiln on the batture, "go tell the governor that it is impossible, for this batture is by law publick property," or words to that effect. Such a loose expression, perhaps not accurately recollected, and at any rate, a mere extra-judicial dictum of an auditor, cannot be considered as legal evidence of title in the Spanish government. This effect could at most be produced by his judicial opinion, reported in due form to the governor, and confirmed by him in his supreme judicial capacity. But this would be precisely such a document as we call for, and which has not yet been and I very believe will never be exhibited.

How comes it, if the batture in question never ceased to be considered as part of the royal demesne, and if the king of Spain, in the language of M. Derbigny, never ceased to exercise acts of ownership over it, that this long established and long exercised right of the Spanish government, was until very lately unknown to every person in the province, and even to the corporation of New-Orleans itself? For, when that body was contending with M. Gravier before the Supreme Court of the territory, for the possession of the property, they did not claim as bailiffs of the United States, or as their tenants at will or at sufferance; but they claimed in their own corporate right, and as far as I can judge from the formal pleadings and notes of the arguments, which I have had before me, the claim of the United States was not once mentioned while that cause was pending.

It is true, that after the court had delivered their final judgment against the corporation of New-Orleans, a motion was made for a new trial on the ground that the United States were entitled to the property, which motion, I am informed the court refused to grant. But this appears clearly to have been an after thought, suggested by the ingenuity of learned council; for it is evident, that if, as M. Derbigny asserts, the batture had never ceased to be a part of the king of Spain's domain, and if the king *had never ceased*

to act as its proprietor, the notoriety of that fact would have been such at New-Orleans, that the governor, the court, or the district attorney at least would have heard of it, and the corporation would not have been suffered to prefer their claim in their own name, without any notice being taken of so notorious a right in the general government.

The officers of the government of Spain appear to have been equally ignorant of it, for it is in proof from authentick documents, which I have perused, that in the year 1794, Mr. Gravier sold various parcels of the batture in question by several notarial acts passed before Mr. Pedesclaux, notary publick, who I am told was also at that time, secretary to the government.

Those who are acquainted with the nature and duty of the office of a notary of the civil law, and of the law of France and Spain on the subject, know very well that those officers not only attest the deeds which are executed before them, but that they draw them up entirely, according to the instructions of the parties and that they are personally responsible, under severe penalties, that the instruments which they so draw up and attest, do not contain any thing contrary to law, to religion, to morality, or to the interest of the sovereign. Code 1, 2, 14, 3—1st Ferriere's parfait notaire, 56.

Now in this state of things, would a notary, would a secretary to the government have lent his assistance to the sale by one man to another, of property which not only did not belong to the vendor, but which notoriously belonged to the king himself, who according to M. Derbigny never ceased to be exercising acts of ownership over it, acts to which the notary, in his capacity of secretary, must necessarily have been privy and the evidences of the king's right must have been lodged in his office if any where?

With these observations I shall take leave of this fourth point.

FIFTH POSITION OF MR. DERBIGNY.

.....

" *Neither Jean Gravier, nor those from whom he derived his title, ever were in possession of the alluvion, and Bertrand Gravier himself, at the time of settling a suburb in front of his plantation declared that he had no claim to the alluvion.*

This allegation divides itself into two distinct propositions, the first, that M. Gravier never had possession of the batture, the second that if he had, he afterwards abandoned or gave up his right.

As to the first point we say, that even if nothing more appeared, M. Gravier must be considered to have had precisely the same possession of his batture that the other owners of land on the Mississippi had of theirs. If in point of law it was to be considered as a part of his estate, it was not necessary that he should build an house, or erect improvements on every spot of his land, in order to be considered in the actual possession of it.

But we do not rely merely on constructive possession, because it is in proof that M. Gravier was ordered by the governor to repair the levee, that the same governor directed his permission to be asked for laying masts on that identical spot, and that in the year 1794, he sold several parcels of that same alluvion land, and reserved a right out of others to dig earth and sand, all which acts are incompatible with the idea of his being out of possession.

And lastly we consider this point as finally decided by the sentence of the Superiour Court in the case of *Gravier* vs. *The Corporation*, the court having decreed that he should be quieted *in his lawful possession of the batture;* if this judgment is not conclusive against all the world, as to the fact of possession by Gravier, it is at least the strongest evidence of it that can possibly be adduced. I proceed to the second point.

It is pretended that M. Gravier has abandoned his claim to the batture. Now, if he had no lawful claim to it, his abandonment is not necessary to make out the title of the United States, or of any other person who had a real right to that property; but if he had, I should think that it would require something more than evidence of some hasty words or of a loose conversation to devest his property out of him.

The facts appear to be these—M. Gravier having laid out the front of his plantation into a suburb, and the lots being all or mostly sold and built upon, was directed or asked to repair the levee, being considered as still the owner of the alluvion, as in fact he was, not having legally parted with it. At that time the batture was considered as of little or no value, and M. Gravier permitted the inhabitants of New-Orleans to make use of it for various purposes. To that order or request he is said to have replied, that as he had sold the fauxbourg he had nothing to do with the batture, and that he would not repair the levee or words to that effect. The expressions stated by M. Derbigny are, *that having sold the fauxbourg he considered himself as discharged from the duty of repairing.*

I can see nothing in these words that amount to an abandonment of M. Gravier's right of property in the batture. If the corporation, by his permission or sufferance, made use of it, and exclusively derived all the benefit from it, it was natural for M. Gravier to expect, that while they continued to enjoy that benefit they should be at the trouble and expense of the repairs. For, *qui sentit commodum, sentire debet et onus.* This appears to me to be the most natural, and I think the only probable interpretation of the words which are said to have been spoken by M. Gravier, if there be no misconception or misrecollection in the testimony of the witnesses.

To whom did M. Gravier abandon his right to the batture? Was it to the king, to the corporation, to the purchasers of the suburb lots, or to the first occupant? On this

subject every one is at liberty to draw what inference he pleases. While the suit was pending between M. Gravier and the corporation, the abandonment was said to be made to the citizens of New-Orleans, and after the judgment of a competent court has negatived the assertion, it is pretended that it was made to the royal majesty itself! The fact is, that it does not appear that M. Gravier made mention of either, and he does not seem to have thought of any thing but of discharging himself from the duty of repairing the levee, while others were enjoying the use and benefit of his property.

But even had this pretended abandonment been expressed in the strongest words that could be devised with a designation of the party in whose favour it was made, I ask whether the law of Spain permits a citizen to devest himself of his real property by mere word of mouth, and without committing the act in some manner to writing? If it does, I can only say that it differs from the law of every civilized country, where a due regard is paid to a regular transmission of real estates, and on that account that the existence of such a law ought to be clearly proved, whereas it is not even alleged.

And after all, even if M. Gravier, under a mistaken idea of his rights or of the rights of others, had made the most formal abandonment of the property in question, such an act would be relieved against in a court of equity. This relief was granted in England to the executor of a mortgagee who had assigned the mortgage to the heir, under the mistaken idea that the latter was entitled to it. *Turner* vs. *Turner*. 2 Chanc. rep. 81. Thus again if there is an agreement for the sale of an estate, and the purchase money has been paid, if it turns out that the estate was the vendee's, and that the sale was made under a mistake, the court will order the money to be refunded. *Bingham* vs. *Bingham*, 1 Vesey, 126. And there are a variety of other cases which might be cited to the same effect.

Now it must be plain that the United States could not even in that case, conscientiously take and retain property in consequence of an unguarded act, against which their own courts of equity would think themselves bound to grant relief.

.....

On the whole of this case, therefore, I am of opinion:

1. That by the law of France, as it stood to the time of the late revolution, the alluvions of navigable rivers did not, of right, belong to the king, but to the owners of adjacent estates.

2. That however the law might be in France on that subject there was no such prerogative in the French colonies, and particularly in the colony of Louisiana, where there was no feudality nor noblesse, and where lands, as far as we have seen appear to be held by an *allodial* tenure, which excludes feudal rights.

3. That even if it were otherwise, unless it should be clearly proved that there existed an alluvion or batture in front of the land where now stands the suburb St. Mary, at the time when Spain took possession and proclaimed the Spanish laws in 1769, the law of France cannot operate, but the case must be governed by the Spanish law, which is admitted not to vest any alluvion rights in the sovereign.

4. That even admitting the right claimed on behalf of the king of France to its fullest extent, and admitting that the batture or alluvion in question existed in 1769, yet as that alluvion never was, by judicial decree, declared to have been annexed to the demesne of the crown, it cannot now be considered as a part of it; it being clearly within the description of those *casual* rights or accessions, of which the sovereign by the law of France cannot be legally seized without a regular judgment of annexation to the crown.

5. I am further of opinion that the right of soil in the road and levee in front of the suburb St. Mary, has not been

either expressly or impliedly reserved by the government of France out of the sale which was made of the Jesuits' estate:

6. That neither the said road or levee nor the said batture or alluvion, have, at any time, been considered in law or in fact by the government of France or Spain in Louisiana, as a part of the sovereign's demesne; but that Jean Gravier, and those under whom he claimed, have always considered themselves and been considered by the said governments as the lawful owners thereof.

7. And therefore that the claim now set up on the part of the government of the United States to the said alluvion, as a branch of the royal prerogative or otherwise, is not founded, as far as I have seen, in either law or fact, and cannot be supported.

PETER S. DU PONCEAU.

Philadelphia, 26th July, 1808.

CASE

FOR THE CONSIDERATION OF COUNSEL.

.....

IN the month of August, 1717, the king of France made a grant to the West-India company, the fifth article of which is in the following words: "In order to provide the said West-India company with the means of making a permanent establishment, and to execute all the plans they may form, we give, grant and concede to them forever, all the lands, coasts, ports, havens and islands, which form our province of Louisiana, as well and with the same extent as we had granted it to M. Crozat, by our letters patent, dated 14th September, 1712, to enjoy the same in full property, lordship and justice, reserving to ourselves no other rights but fealty and liege homage, which the said company shall render to us, and the kings our successors, with a crown of gold of the weight of twenty marks."

By the 8th article they are empowered to grant lands in *franc-aleu* or *allodium.*

In the year 1726, M. De Bienville, governor of the province of Louisiana under this charter, grants to the company of the Jesuits twenty arpents in front, on the river Mississippi, by fifty in depth, to be held in "*franc-aleu.*"

The order of the Jesuits being suppressed, and their property annexed to the crown, the plantation was divided into six lots, each fronting the river, and in the year 1763, sold to different persons. Two of these lots, by sundry descents and mesne conveyances were vested in John Gravier, the present party.

By the 15th article of the charter to the West-India company, the custom of Paris is established as the law of the province,

In the year 1762, before the sale of the Jesuits' property, the province of Louisiana was ceded by France to Spain, but possession was not taken until 1769.

The purchasers under the sale of 1763, have never been disquieted in their possession by the Spanish government after the transfer of possession.

Along the whole course of the Mississippi, a dyke or levee is thrown up, in order to restrain the water at the time of the annual inundation, which usually continues six months in the year, and by which the whole country would otherwise be covered, as the land on each side is lower as it recedes from the river until it reaches the sea.

Within the dyke is a highway, which, as well as the dyke or levee, is made and repaired by each inhabitant, as far as it extends along his land. The publick have always used the land between the dyke and the river for tracking boats, and other purposes of navigation. But as alluvions are frequent in that country, the inhabitants have always exercised the right of enclosing such alluvion lands by a new levee nearer the river, whenever the alluvion was of sufficient importance to bear the expense, giving to the publick a new road, and always leaving them the same right of using the ground between the new dyke or levee and the river, which they had before.

Between the dyke and the river, opposite the twenty acres sold by governor Bienville to the Jesuits, a considerable alluvion has been formed at different periods, since the year 1763, and possibly in some slight degree prior to that time.

The alluvion was not of sufficient value until the year 1803, to indemnify the proprietor for making a new levee, and of course the publick enjoyed it in common with the other lands between the dyke and the river, for tracking their boats, and other purposes of navigation, during the season in which it was not covered with water, that is to say, about six months in the year.

In the year 1788, the proprietor of this land laid out that part which lies within the road, into lots, and formed a

suburb: at that time a considerable alluvion had been formed. In selling the line of lots which fronts the road, he sells them by certain fixed boundaries, and according to a map on which the lots were delineated, but none of them are bounded on the river or go beyond the road.

In two or three instances he conveys besides the lots, *the alluvion land in front thereof*, reserving a servitude of digging earth on the alluvion.

There is evidence that at the time this suburb was laid out, the proprietor, being called on to make the road and levee, verbally declared that he conceived himself discharged from this duty, and that as he had sold the front lots he had abandoned the alluvion, but there is an uncertainty as to the nature of this abandonment: one witness says he declared it was to the city; another to the inhabitants of the suburb; and a third that it was to the publick. Since that time, to wit, from 1793 to 1803, the roads have been kept in repair once or twice by the publick criminals, the rest of the time by the inhabitants whose lots fronted the road. It is also in evidence that some short time after the establishment of the suburb, the governor directed all the buildings which had been erected (a few temporary sheds) to be demolished; but this is accounted for in two ways without considering it as an act of ownership. 1st—Because the publick had a right to use the land between the dyke and the river, for the purposes of navigation, although the property remained in the proprietor of the adjacent soil: the governor therefore (who was also judge) had a right to remove all buildings which obstructed this use, until the proprietor should by erecting a new levee, and making a new road nearer the river, give the publick the same facility of navigation which they had before. 2nd—It was proved by the clerk of the cabildo, or governor's council, that he had officially made the proclamation for demolishing the buildings, and that it was because they stood in the range of the fort guns.

All the proprietors of land on the Mississippi, without any exception (unless the present case may be considered as

one) have uniformly occupied and enjoyed the alluvion formed in front of their respective farms, without any claim being set up, either by the French, Spanish or American governments—and it is also to be remarked, that the proprietors of the other divisions of the Jesuits' farm, have always, without interruption, enjoyed their alluvion, although they hold under grants made at the same time, and in the same words with those in question. By treaty, dated 30th April, 1803, the province of Louisiana was ceded to the United States, and by the third article the inhabitants are to be secured in the possession of their property.

In the year 1804, John Gravier, the proprietor of the land, finding the alluvion of sufficient value and extent to justify the expense, threw up a dyke, enclosing a portion of about 500 feet square.

The inhabitants of the city of New-Orleans, had, prior to this period, 1804, as far back as the oldest witnesses could remember, been in the practice of digging sand from this alluvion, or making mortar, and filling the streets. This seems to have been permitted on account of the trifling value of the land, but about the time last mentioned Gravier opposed this practice; the corporation then claimed it as a right, and Gravier filed a petition to the Superiour Court of the territory, stating his right to the alluvion, and that the inhabitants of this city, disturbed him in the enjoyment of it, by digging the soil, and by publications tending to discredit his title, and praying that the corporation might set forth under what title they claim, and that he might be quieted in his possession, and they be perpetually enjoined from troubling him therein.

To this petition the mayor, aldermen and inhabitants, answer by first denying that Gravier is the owner.

2. By stating that B. Gravier, the ancestor of the plaintiff, had abandoned the alluvion to the publick, since which the levees have been repaired by the publick or by the city, that since that abandonment the inhabitants had never ceased to enjoy the use of the alluvion, for piling wood, unloading

boats, &c. That some individuals under the Spanish government had built houses thereon, which by order of government were destroyed.

The case being at issue on these pleadings, was heard at three several periods, and at length decided on the 23d May, 1807, by the decree, a copy whereof is annexed, in which the bench was unanimous.

After this decree a motion was made for a new trial; the ground relied on was that the alluvion belonged to the United States, and therefore the plaintiff could not recover. The court however rejected the motion, declaring that there was no colour of title in the United States. The judgment was confirmed and in the month of June following, carried into execution by the sheriff, who served the injunction on the defendents, and put the plaintiff in possession of that part of which he had been deprived.

Gravier having sold to Edward Livingston and Peter De La Bigarre the greater part of this alluvion; after the decree, they took possession, and having made a partition, Mr. Livingston began to make improvements on his portion, and upon the 25th of January, 1808, had expended about 13,000 dollars thereon—On that day a letter was received by the marshal of the district, from the secretary of state, telling him that it was the direction of the president that he should "go to the place called the batture, in front of the suburb St. Mary, and drive off all persons whom he *may find* thereon, who have taken possession since the 3d March, 1807." But neither Mr. Livingston, nor any other person under whom they claimed, had received any intimation or notice whatever, that any such proceedings were intended, or any citation to shew or defend their title. On the 25th of January, Mr. Livingston presented a petition, a copy of which is annexed, praying an injunction against executing the president's order. This injunction was granted and served, but disregarded by the marshal, who called out three regiments of militia, and drove off Mr. Livingston's workmen. These proceedings are understood to have had been

under colour of the law of the 3d March, 1807, entitled "An act to prevent settlements being made on land ceded to the United States, until authorised by law." 3 laws U. S. page 317.

And it is stated by the president, that he acted under an official opinion of the attorney general, that the land belonged to the United States.

Mr. Livingston can prove actual damage, in consequence of these proceedings, exclusive of the value of the property, to more than 40,000 dollars, for this year alone.

The Superiour Court of the territory of Orleans is a court in the last resort, from whose decrees there is no appeal.

On these facts the answer of counsel is required to the following questions:

I.—By what law is the claim of the proprietor of the twenty arpents front of the alluvion land, to be determined? By the law of Spain, to whom the country was conveyed prior to the sale in 1763? Or by the laws of France who actually held the country until 1769? If by the law of France is it not incumbent on the party contending for that law as the rule of decision, to shew that there was an alluvion formed between the year 1763, and the year 1769?

II.—There being no dispute as to the Spanish law, in case that is resorted to, it is required to know what is the law of the late kingdom of France, on the subject of alluvion on navigable rivers; does it belong to the king or the proprietor of the adjoining soil?

III.—What is the law on this subject, by the custom of Paris?

IV.—What is on this subject the law of the French colonies generally, and of Louisiana in particular, as it stood before the Spanish laws were introduced there?

V.—Did not the royal right of alluvions in those provinces of France, where it formerly prevailed, depend on the principles of feudal tenure; and will the king have it when it is granted in *franc-aleu*?

VI.—Does under the law of the late kingdom of France or of Louisiana as one of its colonies, or under the custom of Paris, the right of the publick to use a road along a navigable river, debar the proprietor whose lands are bounded on the river, of the right of alluvion?

VII.—Will the verbal declaration of the proprietor, that he had abandoned, deprive him of his property, without any evidence in writing, or any proof of the precise terms, time, and conditions of abandonment, or will it operate when the evidence is of the uncertain nature stated in the facts?

VIII.—Have the United States under the circumstances of the case now stated, any title to the land called the batture in front of the suburb St. Mary?

IX.—Was the order to dispossess the occupants of the batture, a legal exercise of the power vested in the president by the law of the 3d March, 1807?

X.—Was not the judgment of the court such a *prima facie* evidence of title, as should have entitled Gravier, and those claiming under him, to the right of a trial before he could be dispossessed?

XI.—If the law of the 3d March, 1807, should, in terms, authorise the proceedings that have taken place, is not the law itself unconstitutional and void?

XII.—Was it lawful in the president to issue his warrant before the commissioners had reported according to the proviso in the latter clause of the first section of the law?

XIII.—Has Mr. Livingston any action, and against whom for his damages?

No. I.

John Gravier, vs. *The Mayor, Aldermen, and Inhabitants of the City of New-Orleans.* — On a suit to quiet the plaintiff in the possession of the alluvion land, or batture fronting the suburb St. Mary.

JUDGMENT OF THE SUPERIOUR COURT

OF THE TERRITORY OF ORLEANS.

1st.—The title of Bertrand Gravier, the ancestor of the plaintiff to the tract of land on which the fauxbourg St. Mary is situated, has not been disputed; but it has been contended that this tract was bounded by the highway; the court however are of opinion, that according to the evidence exhibited, and the general usage of the country, this tract of land was bounded by the river Mississippi.

2d.—From the examination of the authorities, the court are of opinion, that according to the civil and Spanish laws, the right of alluvion is incident to land which is bounded by a navigable river, and that these laws must form the rule of decision in the present case.

3d.—If Bertrand Gravier therefore had continued proprietor of the whole tract on which the fauxbourg has been established, there would be no difficulty in determining his title to the alluvion: but Bertrand Gravier had devested himself of all title to that part of his tract on which the fauxbourg is established, by selling the lots fronting and adjoining the highway. It is therefore important to enquire what was the situation of the batture or alluvion in question, at the time the fauxbourg was established; or at least when the front lots were sold, for if no alluvion existed at that time, when Bertrand Gravier ceased to be the owner of the land adjoining the high road, then it is the opinion of the

Let an injunction issue agreeable to the prayer of the petition. 25th January, 1808.

GEO. MATHEWS, Jun.
JOSHUA LEWIS.

I hereby certify that the foregoing is a true copy of the original petition and order on file in this office.

J. W. SMITH, Clk. S. C.

March 28, 1808.

.....

Answers to Mr. Livingston's Questions,

BY MR. INGERSOLL AND MR. RAWLE.

1.—The law of that kingdom to which the country belonged when the title of the individual commenced, whether the present proprietor, or those under whom he claims, must govern. Whatever was expressed in the contract at the time of the first grant or conveyance from the crown or sovereign proprietor, is of course binding; and whatever from the then existing law of the country was implied, in relation to the subject of the contract, is equally binding. Whether the alluvion then existed or not, is consequently immaterial. It is a part of the contract that if at a future day it shall be formed, it shall go to the grantor or grantee, as the case may be.

The 2d, 3d, 4th, 5th, and 6th, questions turn on this general and important point. The law of France on the subject of titles to land, has not been a part of our regular studies. To hazard an opinion from an occasional view of it in the present instance, cannot be expected from us. We deem ourselves at liberty only to go so far as to say, that having attentively perused the opinions given by M. Derbigny, of

New-Orleans, on the one side, and M. Du Ponceau on the other, the weight of argument and authority appears to us clearly and amply in favour of the latter.

7.—This question is in a degree connected with the five preceding ones....It must depend on the laws of a foreign country, with which we are not conversant. As the facts are stated to have taken place while the country belonged to the Spanish crown, the question must be determined by the laws of Spain. We can only say, that if by the laws of that country the consequences supposed by M. Derbigny would flow from what is stated to have taken place on the part of M. Gravier, it must be a very singular and a very dangerous code, and that such consequences would not ensue by the laws of the United States.

8.—If John Gravier at the time of the cession of Louisiana to the United States, possessed a right to the alluvion in question, we are perfectly satisfied that the cession did not deprive him of it. The third article of the treaty of April 30th, 1803, expressly guarantees to the inhabitants of the ceded territory, their property as well as their liberty and religion.

The second article indeed professes to transfer only the publick property, and it would be injustice to suppose that any thing less was intended.

If at the time of the transfer, 1803, the alluvion did not exist, and if by the laws of the United States alluvions were publick property, a question might be raised, which, even under these circumstances, we should have little difficulty in deciding in favour of M. Gravier....But neither the fact nor the law occasions any doubt in this case; not the fact, because the alluvion was then very considerable; nor the law, because with us it is perfectly settled, that as to lands gained from the sea, either by alluvion, by the washing up of sand and earth, so as in time to make terra firma, or by dereliction, as when the sea shrinks back below the usual water marks, if the gain be by little and little, it shall go to the owner of the land adjoining; but if sudden and considerable, it goes to the state.

The 9th, 10th and 12th, may be considered together. It appears to us impossible to consider the proceedings of the executive, as authorised by any existing acts of Congress. The fourth section of the act of March 3d, 1807, authorises the marshal, under the instructions of the president, to remove from the "*lands aforesaid*," every person who shall be found on the same, and who shall not have obtained permission to remain thereon as aforesaid.

To ascertain what is meant by the "*lands aforesaid*," we recur to the first and second sections, where it appears to refer to lands ceded or secured to the United States by a treaty with a foreign nation, or a cession of any particular state, which shall be taken possession of after the passing the act, and which lands have not been previously sold, ceded, or leased by the United States, or the claim to which lands by such person has not been previously recognised and confirmed by the United States....The provisions extend to all the lands of the United States. In respect to the territory of Orleans, there is a special proviso, that nothing therein contained shall be construed to affect the right, title or claim of any person to lands, before the board of commissioners shall have made their reports, and the decision of Congress be had thereon.

Three commissioners were appointed by virtue of two acts of Congress (see dates and titles, vol. 7, 288, and vol. 8, 113) and the first of these laws sets out with a full and express confirmation of French and Spanish titles, if accompanied with actual possession, as therein mentioned.

The nature of the several rights or claims to lands, the mode of proceeding and reporting to the executive, in order that the matter may be laid before Congress, are described at large.

According to the case laid before us, M. Gravier, or those under whom he claims were in possession of the batture or alluvion at the time the act of March 2d, 1805, was passed. The possession as a matter of fact is established by the judgment of the Superior Court.

This possession as a matter of right, against the mayor, aldermen, and inhabitants is established by the same judgment. This document then of itself, shows that he is not one of those lawless intruders against whom alone the president is authorised to direct the summary and resistless powers given to him by the law.

We confess ourselves at a loss to discover by what chain of reasoning the executive administration of the United States have been able to bring such a case within the purview of these acts.

11.—In answer to the 11th question we can only say, that an act of Congress intended to authorise such proceedings as have been adopted in the present instance; forcibly and without a judicial hearing to dispossess those who for so many years have held a possession sanctioned by the laws of the foreign government under which title was originally acquired, solemnly promised by treaty to be secured to the individuals; recognised and confirmed to the full extent of the whole controversy before the court, by that portion of the powers of government which the constitution and laws of our country had invested in the highest judicial tribunal existing in the country....That such a law would not only be unconstitutional and void, but meet the severe reprobation of every thoughtful man, of every lover of his country, of every citizen of the United States.

13.—Mr. Livingston can maintain an action against the marshal and all who assisted him for his damages.

JARED INGERSOLL,
W. RAWLE.

Philadelphia, 3d Aug. 1808.

Answers, &c. by Mr. Edw. Tilghman and Mr. Lewis.

THE case stated by Mr. Livingston for the opinion of counsel, respecting his right to a part of the batture in front of the suburb St. Mary, at New-Orleans, seems to rest on grounds, and depend on principles, on which a satisfactory opinion may be given, so far as is necessary, without taking particular notice of the several questions proposed.

It is stated that the order of the Jesuits (to whom 20 arpents *in front on the river Mississippi*, by 50 in depth, had been granted, in *allodium* in 1726) being suppressed, their property was annexed to the crown of France; that this plantation was divided into six lots, *each fronting the river*, and sold in 1763, to different people, under some of whom M. Gravier, or rather Mr. Livingston derives title. It is therefore unnecessary to enquire, what the law of France respecting alluvions, was before or at this period, or whether any alluvion had then taken place, and equally so to consider, whether alluvion can in any case belong to the crown or state, in the case of allodial land; or where a whole province with all the lands, coasts, ports, havens and islands, within which the alluvion takes place is granted to one or more subjects, since the grant by the crown in 1763, to the person under whom Mr. Livingston claims, is stated to be *fronting the river Mississippi*, and it is therefore immaterial whether the crown held the alluvion, if any there was, by one title or the other.

It is also stated, that in 1762, before the sale of the Jesuits' property, the province of Louisiana was ceded by France to Spain, although possession was not taken by the latter till 1769. We have not the treaty containing this act, nor can it (we believe) be easily procured, but it is reasonable to presume, that when the cession was rendered complete by a change of the possession, Spain became entitled to all the rights, and no more, which France had at the date of it, except so far as the same was prevented by intermediate

grants from the crown of France, while she continued to exercise acts of sovereignty therein, and hence it follows that France had no right to any alluvion after 1762, the date of the cession, or at most after 1763, when she made grants of the Jesuits' tract, *bounded on the river*.

Nor could Spain have the right of alluvion after either of these periods, since it is admitted, that by the laws of that nation, alluvion is incident to land which is bounded by a navigable river, and belongs not to the crown, but to the owner of such land.

This being the case, we can see no room to doubt, but that all the increase by alluvion, from 1762 or 1763, to October 1, 1800, when Louisiana was retroceded by Spain to France, clearly belonged to the owner of the land, which gained it, and if it did, France acquired no right to it by the act of retrocession.

It is hardly necessary to consider, on what law the right of alluvion, in the legal sense and meaning of the word, between the 1st of October, 1800, when Louisiana was ceded by Spain to France, and the 30th of April, 1803, when it was ceded by the latter to the United States, depends; since the accumulation or recovery of soil from the river, between these periods, could not have been of sufficient height, to be capable of separate appropriation, and the object of distinct property from that of the first land.

The account given of a supposed abandonment of the batture, or alluvion, by Bertrand Gravier, is so vague and uncertain, and is in itself of such a nature, that it would not be regarded by our law, and it is strange indeed if it would be by any law: but as this depends on that of Spain, of which we have but very little knowledge, we shall leave it for the consideration of others. If he did not devest himself of it, the conclusion is, in our opinion, irresistible, that the United States have not the smallest colour of right to it. But unfounded as the title of the United States is, it seems to us, that the means used by them, or rather by the executive authority, to possess themselves of it, are not built on a more substantial basis.

The act entitled "An act to prevent settlements being made on lands ceded to the United States, until authorised by law," passed the 3d of March, 1807, under which the president is understood to have acted, provides among other things:

1.—That if any person shall, *after the passing of it*, take possession of, or make a settlement on any lands ceded or secured to the United States, by any treaty or cession, *until thereunto duly authorised by law*, he shall forfeit, &c. and moreover it shall be lawful for the president of the United States, to direct the marshal, or other person acting as such, in the manner therein after directed, and to take such other measures, and employ such military force as he might judge necessary, to remove from lands so ceded or secured to the United States, any person who should *thereafter* take possession of the same.

2.—That it should be lawful for the marshal after the first of January then next, under such instructions as might be given by the president, to remove from the land aforesaid any persons who should be found on the same, provided that three months notice should be previously given to such persons, as were settled on the same, prior to the passing of the act.

From the nature of alluvion, and especially of that gained from the Mississippi, there can be, *during its accretion*, hardly any other possession of it, than that which attaches to the possession of the land which gains it, or which remains in the proprietor thereof, after he may have parted with the land to which it had incorporated itself, and this we think a sufficient possession for all legal and reasonable purposes, so as to take the case out of the act. In addition to this, it is stated that the alluvion was of not sufficient value until the year 1803, to indemnify the proprietor for making a new levee, but that "in 1804, John Gravier, the proprietor, thinking it of sufficient value and extent to justify the expense, threw up a dyke of five hundred feet square of the alluvion," and if it belonged to him, and if there was no ex-

clusive adverse possession, this undoubtedly gave him complete possession of the whole of it, as fully as the act could by any fair or reasonable construction require. But what seems to remove all doubts on this head, is that about this time, Gravier opposed a practice, which had occasionally prevailed, for the inhabitants of the city to take sand from the alluvion, for the purposes of making mortar and filling the streets, on which they claimed it as a right, and he thereupon presented a petition to the Superior Court of the territory, stating his right to the alluvion, complaining of the disturbance, and praying that the corporation might set forth under what title they claimed it—that he might be quieted in his possession, and that they should be perpetually enjoined from troubling him therein; and it was so proceeded, that after a full hearing, the court declared on the 23d of May, 1807, that the alluvion belonged to Gravier, and ordered, that he be quieted in his lawful enjoyment thereof, and that the injunction which had been formerly granted, be made perpetual; and in June following the decree was carried into execution, by the sheriff's serving the injunction on the defendants, and putting the plaintiff into possession of that part of which he had been deprived. These proceedings, together with the previous statement, seem most incontestibly to prove that John Gravier could with no propriety be considered as a person *taking possession after the passing of the said act*, of lands ceded to the United States, and before he was *thereunto authorised by law;* and if so, it necessarily follows, that this case is not within the provisions of the act, and that the president had no authority to dispossess him under it.

It is however stated, that M. Gravier having after the decree, sold a considerable part of the alluvion to M. De Labigarre and Mr. Livingston, they took possession—made partition thereof between them; that the latter expended considerable sums of money in the improvement of his part; that on the 25th of January, 1808, the marshal of the district received a letter from the secretary of state, telling him

that it was the direction of the president, that he should go to the place called the batture, in front of the suburb St. Mary, and drive off *all persons whom he might find thereon*, who had taken possession since the 3d of March, 1807; and that in violation of an injunction granted by the same court to prevent it, the marshal executed this order by taking three regiments of militia, and driving off Mr. Livingston's workmen. It is added that it was stated by the president that he had acted under the official opinion of the attorney general, that the land belonged to the United States, and it is also added that neither Mr. Livingston, nor any other proprietor or person under whom they claimed, had received any intimation or notice of any such proceeding being intended, nor were they called upon to show or defend their title.

The third article of the treaty of April 30th, 1803, by which France ceded Louisiana to the United States, expressly guarantees to the inhabitants of the ceded territory, their property, as well as their liberty and religion, and no act of congress, if it were possible to suppose them capable of intending it, could constitutionally authorise the president to deprive them of either. *That*, under which he is supposed to have acted, does not direct the mode by which he shall ascertain whether the lands on which individuals may be settled are secured to them by treaty, or whether they belong to the United States, under the general words of the cession, nor whether they were taken possession of before or after the passing of the act—Nor whether it was by intrusion or by regular process and judgment of the law, but it very properly leaves him to pursue the legal means of enquiry, and when this is done, to cause the removal of any lawless intruders.

A due regard for the rights of property, the security of individuals and the laws and constitution of the country, therefore required, that before force, and especially military force was resorted to, a legal inquest of these several matters, which were all essential to his jurisdiction, should have taken place under a special writ of enquiry, framed according

to the spirit of the act, and adapted to the case, or in a prosecution for the penalties incurred by intruders against it, or in some other legal manner, where the party might be heard, and have an opportunity of showing and vindicating his rights, whatever they might be; but instead of this, the president appears to have referred an *ex parte statement* to the attorney general, and on his *ex parte opinion*, to have determined in an *ex parte manner*, that the alluvion or batture in front of the suburb St. Mary, was not the property of individuals, guaranteed to them under the solemnity of the treaty—that the possession thereof was not "authorized by law," although the record of the highest legal tribunal in the territory showed that it was, and that M. Gravier, after having been disturbed, was not such an intruder as the law contemplates, but was legally put into possession by the sheriff, under the judgment and process of law; and what is still more extraordinary the president appears to have left it to the marshal, a mere ministerial officer, altogether unauthorised to judge in the case, to determine who had taken possession *before* or *after* the passing of the act, and without regarding whether it was by the judgment of a court or not; for the orders to him are stated to be "to go to the batture and drive off all persons *whom he might find thereon, who had taken possession since the 3d of March*, 1807." This order is not only as general in its nature but as illegal in its principles, if not as dangerous in its consequences, as any general warrant ever was; for it sets at nought a law of the United States—a solemn treaty, and the decision of a legal tribunal of the last resort; and we are therefore of opinion, that those who issued it, the marshal who obeyed it, and all who aided and assisted in its execution, are joint trespassers and answerable in damages to Mr. Livingston, for the wrong and injury which he has thereby sustained.

EDWD. TILGHMAN.
W. LEWIS.

Philadelphia, Aug. 16th, 1808.

District Court of the United States.

NEW-YORK DISTRICT, August Term, 1809.

United States

vs.

Hezekiah Smith, Stephen Griffith and Nathaniel L. Griswold.

TALMADGE, *Judge.* This action was upon a bond executed by the defendants to the United States and delivered to the collector of the port of New-York, having annexed the following condition, viz. "Whereas the following "goods wares and merchandises, that is to say, 1272 bar- "rels flour, as per manifest now delivered to the collector "of the customs of the port of New-York and intended to "be transported in the said vessel called the James Wells, "burden 178 11-95 tons to the port of St. Mary's in the "state of Georgia: Now, the condition of the above obli- "gation is such that if the above-mentioned goods wares "and merchandises, shall be relanded in the United States, "*at the port aforesaid* or at some *other* port of the United "States the dangers of the sea excepted, the said obliga- "tion shall be void, otherwise, &c."

The bond was taken by the collector under authority of the 2d § of the embargo act of the 22d December, 1807, requiring that no vessel shall be allowed to depart from one port to another of the United States, unless the master, &c. shall first give bond with one or more sureties "*to the collector of the district,*" that the goods, &c. shall be relanded "*in some port of the United States.*"

It was argued, upon demurrer, by Messrs. Riggs, Hoffman and Emmet for defendants, That a bond required and taken under colour of a statute is not valid unless the same is in strict conformity with the authority of the act; that the

statute under colour of whose authority this bond is taken requires the security "*to be given to the collector of the district,*" whereas it is made payable to the United States and is conditioned to reland the goods, &c. at *the said port of St. Marys* or at some *other* port of the United States, which being a variance from the words and authority of the act the bond is against law, and void as well under the act as at common law.

Mr. SANDFORD for the United States.

The Judge said that the authorities cited by the defendants' counsel were decisions upon the particular words of the 23d of Henry VIth, authorising and requiring bail bonds; which statute prescribes the form of the security and declares all others to be void, and hence it was very properly decided that the particular form marked out was alone decisive and all others void per force of the statute. That the purpose of that act was to correct abuses which had crept into a system of former practice; the purpose of the act in question is to create an entire new system, it prescribes no form of bond nor avoids any that shall be adopted; it merely authorises the president to give such instructions as appear the best calculated to carry the act into effect—That he was satisfied upon an attentive perusal of the act, it did not mean to confine the security to the person of the collector as the obligee, but merely through his agency to ensure by bond, a conformity to its restrictions, and that the bond as taken embraced the substance and was within the spirit and authority of the act—a voluntary bond and valid—

Judgment for the United States.

.....

United States vs. *Brig Little Ann.*

This brig having the president's permission to proceed to the West-Indies for American property, sailed from Bristol in the state of Rhode-Island, and when at sea off the East

end of Long Island was captured by the United States' frigate Chesapeake and sent into this port for trial.

Besides the articles of permitted stores there were found on board other goods, and the libel charged her with lading on board merchandise in the night time without the permit of the collector or the inspection of a custom house officer and of exporting the same.

The Judge condemned the vessel and cargo on the ground of an unlawful exportation from the United States, and decreed restitution of the articles which were permitted by the collector as necessary stores for the voyage, and ladened under proper inspection.

.....

United States vs. *Sloop Polly and Jane.*

In this case the libel also charged a lading without permit and inspection, and it appeared in evidence that goods of a greater value than $ 400, were so taken on board the sloop, as composing her cargo for an intended illicit voyage, but that the lading was effected at different times and places and at no one time to the amount of $ 400 worth. His honour held the different ladings of the cargo as aforesaid to be a continuation of the same transaction and one offence; and that the aggregate value of the goods so laden exceeding in amount the sum of $ 400, the vessel, &c. became liable to forfeiture.—Condemned.

.....

Manner of Proving Deeds in New-York.

Every deed, conveyance or writing relating to the title or property of any lands or real estate within this state, being duly acknowledged by the party or parties executing the same, or proved by one or more of the subscribing witnesses

thereto, before one of the judges of the Supreme Court of the United States, or before one of the justices of the Supreme Court of this state, or a master in Chancery, or the first judge of any Court of Common Pleas, or before any other of the judges of the Court of Common Pleas of the county where such lands or real estate are situated, or if the same be situated in the cities of New-York, Albany or Hudson, before the mayor or recorder of the said cities respectively, and a certificate of such acknowledgment, or proof being endorsed thereon, and signed by the person before whom the same was taken, shall and may be recorded in the office of the secretary of this state, or of the clerk of the county in which such lands or real estate are situated. *Provided however*, that no such acknowledgment shall be taken, unless the officer taking the same shall know, or have satisfactory evidence that the person making such acknowledgment is the person described in, and who has executed such deed, conveyance or writing, and that no such proof shall be taken unless the officer taking the same shall know the person making such proof, or have satisfactory evidence that he is a subscribing witness to such deed, conveyance or writing, and that such witness knew the person who executed the same, all of which shall be inserted in the said certificate of such acknowledgment or proof; and in case of the examination of witnesses, it shall also be the duty of such officer to set forth in such certificate what witnesses were examined before him, and the substance of the evidence by them given:

II. "No estate of a feme covert residing in this state shall pass by her deed, without a previous acknowledgment taken in manner aforesaid, and made by her on a private examination apart from her husband, that she executed such deed freely, without any fear or compulsion of her husband, which shall in like manner be contained in the certificate of such acknowledgment to be endorsed on such deed; but where any feme covert not residing in this state, shall join with her husband in any deed or conveyance of, or relating

to any lands or real estate situated within this state, she shall thereby be barred of, and from all claim of dower, and all other right and title therein, in like manner as if she were sole, and the acknowledgment or proof of such deed, conveyance or writing may be the same as if she were sole, and shall entitle such deed, conveyance or writing to be recorded as aforesaid."

III. " All acknowledgments and proofs of any deeds, conveyances or writings made as aforesaid by British subjects actually residing within the kingdom of Great Britain, or the dominions thereunto belonging to any citizens of this state, of or concerning any lands or real estate situate in this state, taken or made, or hereafter to be taken or made before the mayor of the city of London, and duly certified under the seal of office of the Mayoralty of the said city, or before any minister of the United States resident in Great Britain, shall be of the like force and validity, and entitle the same to be recorded, as if the same were taken before a judge of the Supreme Court of this state."

IV. This section provides, That deeds executed " after the first day of February, 1799, for lands situate in the several counties of Ontario, Steuben, Tioga, Herkimer, Onsida, Chenango and Otsego," or any writings which may affect them either in law or equity, after proof as aforesaid " shall be recorded in the clerk's office of the county where situated, and unless so recorded " shall be adjudged fraudulent and void against subsequent *bona fide* purchasers or mortgages for valuable consideration" if their conveyance is first recorded.

V. Provides, That the secretary or clerk shall record the conveyances aforesaid " in the order and as of the time when the same shall be delivered for that purpose, and shall be considered as recorded from the time it was so delivered;" " and the secretary or clerk shall endorse and sign a certificate on such deed, conveyance or writing of the particular time when, and of the book and page in which the same is recorded, and " that every deed, conveyance or

writing so acknowledged or proven, whether the same be recorded or not, or the record thereof, or a transcript of such record certified by the secretary of this state, or the clerk in whose office the same may be recorded or registered under the seal of the Court of Common Pleas of the county where he is clerk, may be read in evidence in any court of this state without further proof thereof."

VI. No secretary or clerk shall record any deed, conveyance or writing unless proven as aforesaid, and which acknowledgment or proof shall be recorded therewith.

VII. If either of the persons within this state authorised to take the proof aforesaid, or the secretary or clerk, or their deputy shall be guilty of any neglect, misdemeanour or fraudulent practice in the execution of their respective duties prescribed by this act, they shall be liable to pay to the party injured treble damages with full costs.

VIII. A repealing section.

☞ *Nota.* Except in the counties mentioned in § IV. no deeds are obliged to be recorded—since this act, several of those counties have been divided and new counties created out of them, to which new counties this law applies.

The 1, 2, and 3, sections are copies of the act—the 4 and 5 are abridged, except those parts which are marked by comma's—The substance of the 6, 7, and 8, is only given.

CIVIL LAW.

(TRANSLATED FOR THE AMERICAN LAW JOURNAL.)

Continued from Vol. II. page 250.

A Translation of the First Title of the Fourteenth Book of the Digest, entitled:.....De exercitoriâ actione.

DIGEST, Book XIV. Tit. I.

Of the responsibility of Ship Owners, for the acts of the Master, and of the action which results therefrom, called actio exercitoria.

LAW I.

Ulpianus, lib. 28. Ad Edict.

Utilitatem....The usefulness of this edict is so evident, that every one must be sensible of it. For, as we are sometimes obliged to contract with masters of vessels, with whose persons or condition we are entirely unacquainted, it is equitable, that he who has appointed such master to the command of the vessel should be bound by his acts, in the same manner as he is bound who appoints an agent, factor or deputy to his tavern or traffick, the necessity being greater to contract with the master of a vessel, than with such agents. For we may enquire into the condition of the agent with whom we contract, but not so with a master of a vessel, for, sometimes, neither the time nor the place will allow of deliberation.

Magistrum Navis. § 1. We call him the *master of a ship* who has the care of the whole vessel.

Sed si. § 2. (But) if we *contract* with any of the mariners, we have no action against the owner, although an action lies against him for the *tort* of any of those who are on board

the vessel for the sake of navigating her. For there is a difference between torts and contracts: he who appoints a master, tacitly authorizes you to contract with him; he who appoints mariners, does not so authorize you, but is nevertheless answerable for the frauds and tortious acts which they may commit.

Magistri autem. § 3. Masters are appointed for the sake of letting vessels to hire either to transport merchandize or passengers or to purchase things necessary for the furniture of the vessel: but if he is also appointed to buy or sell merchandize, he binds the owner *hoc nomine.*

Cujus autem. § 4. It matters not what is the condition of the master, whether a freeman or a slave, and whether the servant of the owner of the vessel or of another; nor matters it of what age he is, he who appoints him being to impute all to himself.

Magistrum autem. § 5. We not only call him *master* whom the owner has appointed, but him also whom the master has put in his place, and so the learned Julianus answered to an ignorant owner. Besides, if he knows and suffers him to act as master in the vessel, he is supposed to have appointed him. This opinion appears to me indisputable. For, he who has appointed a master, must answer for all his acts, otherwise those who contract may be deceived, and this is more easily admitted against masters of vessels than against other agents, for the sake of utility. What then if he who appointed the master, forbid him to substitute another in his stead? We must see now whether we can admit the opinion of Julian in this case. Suppose the owner has positively forbid the master to appoint Titius, by name, as his substitute. It must be said, however, that even in that case, the interests of those who navigate must be attended to.

Navem accipere. § 6. *Navis* is a generic name for all vessels, whether they navigate on the seas or in lakes, or in rivers, it also applies to boats. *Schedus*).

Non autem. § 7. The prætor, however, does not, in all cases, give an action against the owner, but only for such

things to which the master *has been appointed*, that is to say: If he has been appointed to that particular thing, as for instance, if he has been hired to carry a burthen, or has purchased some thing useful for the passengers, or if he has contracted for any thing for the ship's repairs, or with the mariners for their labour and hire.

Quid si mutuam. § 8. What if he has borrowed money, it will be considered as done in the regular course of his business? Pegasus is of opinion, that if he has borrowed it for the use of that thing to which he is appointed, an action will lie, which opinion I conceive to be correct. What then *if* he has borrowed for the sake of fitting out the vessel and hiring mariners?

Unde quærit Ofilius. § 9. Hence Ofilius makes a query, whether if he has borrowed money for the repairs of the vessel and afterwards converts it to his own use, an action will lie against the owner? And he says; if he borrowed it *hac lege*, for the purpose of employing it on the vessel, and afterwards altered his mind, the owner is liable, and must impute it to himself that he appointed such a man; otherwise, if his intention was from the beginning to defraud the lender, and if he did not specially express, that he borrowed it for the use of the vessel: which distinction Pœdius proves.

Sed et si in pretio. § 10. But if the master deceived him with respect to the price of the things purchased, it will be to the damage of the owner not of the lender.

Sed si ab alio. § 11. And if having borrowed money of another, he should pay with it the one who had lent money for the repairs of the vessel, I think that this second lender is entitled to his action in the same manner as if he had advanced the money to the use of the vessel.

Igitur præpositio. § 12. The appointment therefore points out a certain rule to those who contract. For, if one has been appointed to the command of a vessel, to receive freight money; but not to let out the vessel, the owner shall not be bound, if the master lets her out, and *vice versa*, if to let to freight and not to receive or demand it, or if he appointed

him to take passengers and not to take goods to freight, or *vice versa*, if he exceed his powers, he shall not bind the owner. If he is appointed to let out the vessel for the freight of certain goods, as for instance hemp or vegetables, and instead of that he takes in marble or other articles, it is said the owner shall not be bound. For there are ships expressly made for carrying of bulky articles, others for the carrying of passengers, and I know that several owners command their captains not to receive passengers, and also to traffick in certain regions and in certain seas. There are for instance some vessels which carry passengers from *Cassiopa* or *Dyrrachium* to *Brundusium*, and which are unable to carry burthens; some of them are able to sail on rivers but not on the sea.

Si plures. § 13. If there are several masters whose offices are not distinct, what is done by any one of them shall bind the owner; if their offices are distinct, as the one to take freight, the other to receive the freight money, each shall bind the owner for what he does in the execution of his particular office.

Sed & si. § 14. But if they have been so appointed, as is done in several instances, so that none of them shall do any thing without the concurrence of the other, whoever contracts with one of them singly, must impute it to himself.

Exercitorem autem. § 15. We call *exercitor (a)* the person who receives the freights and profits of a vessel. Whe-

[*(a)* The Latin word *exercitor* cannot be rendered by an exactly corresponding word in our language; it answers to the French word *armateur*, and means not only the actual owner of a vessel; but he who is in possession of her, whether for himself or for another, who has the care of fitting her out, and who acts as owner, though it may not be in his own right. Thus a special owner, one who holds a ship in pledge to pay himself out of her freights, or one who has hired her for a voyage, or for a limited time, and also he who has the vessel in charge as the agent or factor of the owner or owners, all come within the meaning of the word *exercitor*. The master himself may be *exercitor* in many

ther he be himself the owner of the ship, or whether he has hired her from the owner for a time or forever.

Parvi autem. § 16. It matters little, however, whether this *exercitor*, this general or special owner, is a man or a woman, a father or a minor or a slave; but if a minor owns a vessel, the authority of his guardian is requested to legalize his contracts.

Est autem. § 17. It is at the party's election to sue either the owner or the master.

Sed ex contrario. § 18. But on the contrary, this action (the *actio exercitoria*) does not lie, for the owner against those who contract with the master, because he does not want this extraordinary remedy; but he may sue the master *ex locato*, if he employed him for a reward, or *ex mandato*, if gratuitously. When employed however, in the transportation of provisions, the prefects of the capital and the presidents of the provinces for the publick benefit, will give to owners an extraordinary action, founded on the contract of the master.

Si is, qui navem. § 19. If the *exercitor* of a vessel is in another man's power, and acted as such with his consent, judgment shall be given against him in whose power he is, on contracts made with the master.

Licet autem. § 20. But although an action lies against him in whose power he was, who acted as *exercitor* of the vessel, it must appear that he thus acted with his consent. They therefore are bound *in solidum* (jointly and severally)

cases and under a variety of circumstances. The English term "*ship's husband*" comes nearest to the idea which the word *exercitor* conveys to the mind, but it is a word but lately brought into use, and not yet sufficiently defined; it has been generally employed for the *acting owner*, the one of the part owners who has the actual charge of fitting out the vessel, but we do not know that it has yet been applied to a *mere agent*, though perhaps it might be so applied without impropriety. It must be left to time and usage to fix the precise meaning and application of that word.]

who have the *exercitor* of a vessel in their power, because the employment of vessels is a matter of the highest importance to the commonwealth. But the usage is not the same with respect to factors not employed in and about the fitting out of vessels, those who contract with one of those who traffics for his own account, with the consent of his master, parent or guardian shall only be entitled to relief to the amount of the factor's *peculium*, or hereditary portion. But if a contract has been made with the master of a vessel with the knowledge, though without the consent of him in whose power he is, shall we give an action *in solidum* against the master, father or guardian as if he had consented, or only an *actio tributoria*, that is to say, extending only to the *peculium* or hereditary portion of his dependent? It is best in a doubtful case to follow the words of the edict, and not to raise an obligation *in solidum* from the mere knowledge of a father or master in the case of vessels, nor from his consent in the case of mere land traffick, and such seems to be the opinion of Pomponius; if, says he, the master of a vessel is in another man's power, and act with his *consent*, then the person in whose power he is will be bound with him *in solidum*, otherwise then only *in peculium*.

In potestate. § 21. By those that are in other persons' power we mean, sons and daughters and servants of either sex.

Si tamen. § 22. If, however, a *servus peculiaris*, that is to say, a slave belonging to a minor or to another slave, as a part of his *peculium*, shall act as *exercitor* of a vessel with the consent of the minor or slave to whose *peculium* he belongs, the father or master who has not given his consent shall be held only *de peculis*, but the son himself shall be held *in solidum*. Clearly if they act as *exercitors* with the consent of the father or master, they shall be bound *in solidum*, and also the son, if he gave his consent, shall likewise be bound *in solidum*.

Quamquam. § 23. Although the prætor allow the action only in case of a contract with the master yet (as Julian has

also written) even if the contract is made with the *exercitor* himself, the father or master shall be bound *in solidum.*

Hæc actio. § 24. This action is given against the exercitor *ex persona magistri*, and therefore if you elect to sue one of them, you cannot afterwards sue the other; but if the master pays any thing, the obligation shall be so far diminished, and so if the exercitor pays any thing either on account of his *honorary* obligation, or in the name of the master, the obligation shall be lessened, because he that pays for me discharges me.

Si plures. § 25. If several act as exercitors of a vessel you may sue all or any of them jointly and severally.

LAW II.

Gajus, Lib. 9. *edictum provinciale.*

Ne inplures....No man shall be driven to several adversaries who contracted only with one.

LAW III.

Paulus, Lib. 29. *ad edict.*

Nec quicquam....It makes no kind of difference what share he who contracted had in the vessel, it is his business to make the other part owners contribute by *action of partnership.*

LAW IV.

Ulpian, Lib. 29. *ad edict.*

Si tamen....If several act as *exercitors* of a vessel in their own persons they shall be bound according to their respective shares, nor shall they be considered as masters of the vessel for each other.

Sed si plures. § 1. But if several owners of the same vessel appoint one of their number to be the master, they may be sued on his contracts *in solidum.*

Sed si servus. § 2. If a servant to several owners act as *exercitor* of the vessel with their consent, it will be the same as in the case of several *exercitors;* it is clear that if he acts with the consent of one of them, that one is bound jointly and severally with him, and therefore I think that if he acts with the consent of all, they are all so bound.

Si servus sit. § 3. If he who acted as *exercitor* of the vessel with the consent of his master was a servant, and the master alienes him, he who aliened him is still bound, and likewise if the servant dies, he shall be bound, for he is bound for the master of the vessel though he is dead.

Hæ actiones. § 4. These actions will lie for ever for and against the heirs, so if a servant dies who acted as *exercitor* of a vessel with the consent of his master, this action shall be given after the year, although actions *de peculio* are to be brought within the year.

LAW V.

Paulus, Lib. 29. *ad Edict.*

*Si eum....*If you have for master of your vessel a person who is in my power, I have an action against you if I contract with him. The same if he is our common servant. You will however have an action against me *ex locato* for having hired the labour of my servant, &c. *(The remainder of this § is uninteresting, and relates only to the hiring of slaves, &c.)*

Item, si servus. § 1. Also if my servant acts as *exercitor* of a vessel, and I contract with the master or captain appointed by him, this will not prevent me from having my action against the captain, either *jure honorario* or *jure civili,* for this edict does not prevent any other person from having his action against the master; and the remedy given against the

owner by this edict is cumulative, and the right of action against the master is not taken away by it.

Si unus. § 2. If one of the owners contracts with the master, he has his action against the other owners.

LAW VI.

Paulus, Lib. 6. *Brevis Edicti.*

Si servus non....If a servant or slave acts as *exercitor* of a vessel without the consent of his master, an action is given against him with this difference, that if it is with his master's knowledge, the action is *quasi tributoria*, if without his knowledge, then *de peculio*.

Si communis. § 1. If a slave belonging to several persons acts as exercitor of a vessel, with the consent of his masters, then an action lies *in solidum* against every one of them.

LAW VII.

Africanus, Lib. 8. *Quæstionum.*

Lucius Titius....LUCIUS TITIUS appointed *Stichus* master of his vessel: he having borrowed money, undertook that he had received it for the repairs of the vessel. It is asked whether *Titius* is answerable in an *actio exercitoria* in like manner as if the lender should prove that the money had been actually employed in repairing of the vessel? It is answered that the lender has an action, if when he lends money the vessel was actually in want of repairs, that it is not however necessary that the lender should take upon himself the charge of repairing the vessel, and thus do the business of the owner (which must undoubtedly be the case if he is obliged to prove that the money has been laid out in repairs:) it is enough that he knows that he lends it for a purpose which falls within the master's power and authority, which cannot be done otherwise but by his knowing also that the

money he lends is necessary for repairs; therefore, although the vessel be in actual want of repairs, yet if *much* more money should be lent than was necessary for those repairs, no action *in solidum* is given against the owner of the vessel.

Interdum. § 1. We must also enquire whether the money was lent in such a place where the thing for which it was borrowed could be purchased. What if one has lent money to purchase a sail on an island where no sail at all can be got? In short, the lender must use *some diligence* about this matter.

Eadem. § 2. The same thing nearly may be said respecting the *actio institoria*, that is to say, the action founded on the acts of *factors in the land trade.* For here the lender must also know that the money was necessary to purchase the merchandize which the agent was entrusted to buy, and it is sufficient if he lent it for that special purpose, the lender is not obliged to take upon himself to see that the money is actually so employed.

REVIEW.*

Discussions du Code Civil dans le Conseil d'Etat, &c. i. e. Discussions respecting the Civil Code, in the Council of State, preceded by the corresponding articles of the text and the *projet*; with notes, principally relating to the observations and the jurisprudence of the Courts of Reversal and Appeal. On the *plan* of *M. Regnaud*, (of St. Jean d'Angely) counsellor of state, &c. &c. By M. M. Jouanneau and L. C. De Solon. Quarto 2 vols. Paris.

WHATEVER progress was made during the last century, in various parts of useful or ornamental knowledge, it does not appear that this epoch has reason to boast of any considerable advances in the theory or the practice of legislation. Russia, Prussia and Tuscany had their legislating sovereigns: but their codes are little known out of the states for which they were framed; and we do not find that they had the effect of ameliorating either the constitution or the jurisprudence even of those countries. In France, indeed, a noble undertaking had been carried on for a considerable length of time, and was near its completion, when, with many other extensive and salutary projects, it was overturned by the revolution. We allude to the reduction and reformation of the customary laws of its different provinces. From the work of one of our own countrymen, which we are now perusing,† we learn that this design was conceived in the reign of Charles VII. Soon after he expelled the English from France, he published an ordinance by which he directed all the customs and usages of his kingdom to be committed to writing, to be verified by the practitioners of each place, and to be sanctioned by the great council and parliament; and he ordered that the customs thus sanction-

* Monthly Review.

† *Horæ Juridicæ Subsecivæ*, by C. Butler, esq. of Lincoln's Inn. App. Rev. vol. lv.

ed, and those only, should have the force of law: but such were the obstacles in the way of this measure, that forty-two years elapsed before the customs of any one place were verefied. From that time, the measure lingered till the reign of Louis XII; it was then resumed; and about the year 1609, the reduction of the customs was completed. Those of Paris, Orleans, Normandy, and some others, were soon afterwards reformed: Those of Artois and St. Omers underwent this revision about the middle of the last century; and the reformation of the others was nearly finished. The ultimate object of the plan was to abolish all local customs; and from the general body of the customary law, and the doctrines of civil law, to establish an uniformity of jurisprudence throughout the kingdom. It was a favourite object of the chancellor *d'Aguesseau*; and he had digested it into a regular plan.

In the reign of Louis XIV. much was done for the improvement of the national jurisprudence of France: The French lawyers speak in the highest terms of several of his ordinances; and we are assured by them that they contain the wisest and most salutary regulations, methodically and clearly expressed. Certain it is that, in every maritime state of Europe, his *Ordonnance sur la marine*, is read and admired. During the reign of Louis XV. little was accomplished in the prosecution of this object: but, in the early days of the French revolution, its admirers foretold the wonderful improvements which it would effect in government and law. Other constitutions, it was said, had been fortuitously framed; their parts had been composed to meet the present emergencies, and constituted no systematick whole; they contained many discordant principles, many jarring forms, much unmixed evil, some imperfect good, many institutions which had long survived their motives, and many of which reason had never been the authour nor utility the object. The legislators of the revolution were to produce a very different code. *They* were to tolerate nothing of antiquity which reason did not respect; to shrink from no novelty to which reason might lead; to despise narrow coastings,

in the loss sustained by the criminal of all his property and all his other rights. Must the wife also suffer? must she be violently turned away from an union which has identified her existence with that of her husband? The wife would say, "if you had terminated my husband's existence, you would have permitted me to cherish his memory; you suffer him to live, then permit me to comfort him." For acting up to these sentiments you would esteem her virtue; then legalize the attachment which you admire." The harsher sentiment, however, prevails over that of the first consul, and the article stands in these words: "the previous marriage of a person civilly dead is dissolved in respect to all civil effects, and his wife and his heirs are intitled to the same rights and actions as if he were actually dead."

On all points which relate to marriage, we find that the state is every thing, and the church nothing. After two publications of the marriage at a distance of eight days by a publick officer, before the door of the *maison commune*, with several other civil formalities, the parties are again to present themselves to the civil officer, and, in the presence of four witnesses, declare to him their agreement to become husband and wife; then, in the name of the law, he is to pronounce that they are married, to draw up a legal act of the marriage, and to deposit that act in the publick office. *M. Tronchet* proposes that the public officers should read to the couple, the chapter of the code on the duties of husband and wife. The first consul declares his warm approbation of the motion, because the proposed lecture will leave on the minds of the married couple, recollections which will lead them to inquire of the law what should be their conduct when circumstances of difficulty afterwards occur. The consul *Cambaceres* observes that the chapter in question mentions nothing of the duties of obedience and fidelity which marriage imposes on the woman: but the first consul, who is never at a loss on great occasions, immediately proposes that the "civil officer should explain them to her." It must be owned that the "gipsey jargon," as Mr. Burke has somewhere

termed it, of these modern Solons, does not give us an exalted notion of either their wisdom or their philosophy.

It appears that the subject of divorce was much discussed in the council, and finally it was admitted. The husband may claim a divorce for the adultery of his wife, but the wife can only claim it for the adultery of her husband if he has kept a concubine in their house. Either husband or wife is entitled to a divorce if the other has been condemned to an infamous punishment, and mutual and uniform consent to a divorce, expressed in the manner and accompanied by the conditions and trials prescribed by law, is held to afford sufficient proof that the tempers of the parties are incompatible, and that a peremptory cause of separation exists. We must presume that our readers are acquainted with Mr. Hume's essay on this curious and interesting topick, which certainly will not suffer in comparison with any thing contained in the book before us.

The legitimation of children born before marriage, by the subsequent union of the parents, is a subject which naturally attracts an Englishman's attention; since the memorable refusal of the Barons to admit it, when it was pressed on them by the ecclesiastical part of the council of Merton, is always mentioned as a glorious triumph of our ancestors over foreign innovations. The *Code Napoleon* provides that children born before matrimony may be legitimated by the subsequent marriage of their parents, if both parents acknowledge them before the ceremony or in the act of its celebration. It operates in respect to the descendants of such children, if the children die before marriage; and it confers on the issue thus legitimated, all the rights to which they would have been intitled if they had been born after the union.

Our attention was next caught by some pages in which a considerable discussion occurs respecting the law of adoption. We find traces of this practice in the Jewish and Grecian law, and a few faint vestiges of it in the early histories and codes of some of the German nations: but it never made a part of English law. In Roman jurisprudence, it formed

perpetuating his name, and of leaving to him who is to bear it a fortune that will enable the holder of it to represent him with *eclat*. Such vanity can be tolerated only in the most aristocratick states. The lot of the adopted child will be equally insecure. If the adoption be irrevocable, the child will find himself bound by an engagement which he has not contracted, and to which perhaps he is repugnant; and if it be revocable, so that he can shake off the yoke when he becomes of age, he must of necessity return to his original family. What will he then find in it, but want of wretchedness? for surely it is not intended that his return should have any retro-active effect on the division of fortune and other family arrangements which shall have immediately taken place. With regard to the publick, also, adoption must be attended with equal inconvenience. Should the affileated child have no claims of right on the patrimony of the person who has adopted him, he becomes a kind of equivocal being, a monster in society; he is cut off from his natural family-connections, yet belongs not to the family into which he is adopted. Should he be admitted to all the rights of real children, then the legislator is unjust to the relations of the adopter, as he deprives his natural and real offspring of their legal rights: but, by the law of France, it is not in the power of an individual to take from any citizen his right of succession."

In reply the First Consul says,

"The custom of adoption is so far from being of aristocratick origin, that it is principally provided in republicks, and the modifications with which it is now intended to be sanctioned, harmonize with the order of things long since established in France. With these modifications, it will be a mere transmission of names and patrimony; a species of transmission long in use, and which has never been accused of making the adopted child a monster in the social order of beings. It has been remarked that adoption serves no other purpose than that of gratifying vanity: but it confers more substantial advantages, it procures for old age a greater certainty of support and comfort than that which may be expected from collateral relatives; and it enables the merchant or the manufacturer, who is deprived of children, to create for himself an assistant and a successor. The power of disposing of his property does not, during the life of the testator, form any ties between him and the proposed object of

his bounty. Motives more dignified than vanity may influence his conduct; affection, esteem and sentiment may lead him to the desire of contracting this alliance with a person whom he may consider as worthy of the favour. It effects no change in our morals; while it encourages youth, prepares good citizens for the state, and furnishes supplies for all professions. Much has been said on the probable regrets of the adopting parent: but regret is a possible consequence of all human transactions; we repent of sales, gifts and marriages; yet sales, gifts and marriages are among the ordinary occurrences of life, and are sanctioned and encouraged by law. After all, if a parent should feel himself disappointed in the consequences which he expected from the adoption, he may confine the child to that portion of his property which the law assigns to him. The only remaining argument against adoption is the injury done by it to collateral relatives; but this is not to be taken into account, because the interest of collaterals is of little moment in the eye of the law."

From these discourses, (which we have considerably abridged) the reader will perceive the nature of the arguments used on each side of the question. The opinion of the chief consul prevails; and adoption is received into the code; but under numerous regulations. The adopting parent must be of the age of 50 and be older at least 15 years, than the person whom he adopts. No child, nor any more remote issue of the adopter, must be alive at the time of the adoption; neither can the husband adopt without the consent of the wife, nor the wife without that of the husband; and, except where they both join in the adoption, no individual can be adopted by more than one person. The adopted must have been a continued object of the adopter's bounty and cares for six years immediately preceding the adoption; unless the person adopted has saved his adopter's life, or has rescued him from imminent peril by water or fire. Adoption is not to take place during the adopter's minority; nor between that time and his attaining the age of 25 years, without the consent of both his parents, if both of them be alive, or that of the survivor, if either of them be dead. The adopted person is to remain in his own family, his family-rights

and obligations are preserved to him; marriage between him and his adopting parents and their issue is forbidden; he acquires by adoption no right of succession to the property of the adopter's relatives: but, in respect to that of the adopter himself, he obtains, though the adopter should have afterwards other children, all the rights of a child.

A tribunal of adoption is established; the members of which are required to decide whether all the conditions of the law in respect to this measure have been fulfilled, and whether the person proposed to be adopted has a good character. They must then pronounce whether there be or be not ground for the adoption. After a month's delay their sentence is to be referred to the tribunal of appeal; and, if it be confirmed it is to be inscribed in the publick register of the place at which the adopted is domiciliated. The adoption is then complete.

Such is the actual law of adoption in France; and we join *M. Tronchet* in thinking that it is an anomalous and absurd provision. The restraints imposed on it are very numerous, and must make the instances of it rare. If it had formed a part of the old law, and the use of it had been frequent, we should have regarded the provision respecting it, in the *code Napoleon*, as a legislative sacrifice to publick opinion: but, as it was unknown in the ancient law, we see no good reason for its introduction into the present code. Perhaps, however, as we have before intimated, something more was meant by it than was then intended to meet the publick ear; and the provision was inserted in the code with the view of reconciling the nation to the adoptions which have since taken place in the Imperial family.

On the interesting subject of imprisonment for debt (which as we are happy to observe, now begins to attract in a great degree the general attention of our countrymen) we were rather sorry but not surprized to find no discussion. Creditors are always bound to accept the *cessio bonorum*, under the provision of the law; and the debtor is thus freed from liability to personal arrest, though he is not discharged from the debt.

The work contains very copious and interesting debates on the propriety of giving children a legal right to any portion of the property of their parents; on the effects of voluntary gifts in respect to creditors or purchasers; on the rescision of sales for inadequacy of price; on the publick registration of mortgages; and on several other subjects which come home to an English lawyer: but we have no time at present to furnish our readers with extracts from them.

This publication certainly abounds with curious matters and must interest, in a high degree, all persons who are engaged in any speculations for the amelioration of national jurisprudence. That much in *our* jurisprudence requires emendation seems to be generally acknowledged: that this emendation is an arduous undertaking, and that the rash and the unskilled should be kept from it, are equally true: but that something should be done towards it by the prudent and the wise, is desired by all whom the delay, the expense, and the uncertainty of our present system of law are known. Whenever it is seriously undertaken, it will certainly behove us to avail ourselves of the example and the experience of our neighbours.

We have seen on sale, but we have not been able to procure it, *L'Esprit du code Napoleon*, a work in several volumes highly commended in the *Moniteur*.

(To be continued.)

Biographical.

RIGHT HON. LORD CHANCELLOR ELDON.

(SIR JOHN SCOTT.)

IT is the peculiar praise of the English aristocracy that it is accessible to every class of people. There is no impassable gulph between even the lowest order of the peasantry and the highest rank of nobility. Nothing is required but superiour merit to pass from one to the other.

It is for this reason that the *study of the law* has enriched the English aristocracy with some of its most distinguished ornaments. *Nearly one third of the whole nobility of England are either lawyers or descendants of lawyers.* The constitution reaps a double advantage from this distribution of its honours. In the first place, the laws are doubtless best supported by those who best understand them, or who, even if they have no professional knowledge, have, at least, an hereditary veneration for the means of their elevation. Hence, indeed, the House of Lords has ever been peculiarly considered to be the best guardian of the constitution in general, in the same manner as the popular rights are understood to be the peculiar care of the Commons. It is a second most undoubted good resulting from the same cause, that, under the contemplation of the high honours to which professional excellence may elevate its possessors, the students of the law are encouraged to greater efforts, and these efforts naturally lead to excellence. There are men who would be invincible by money, but who yield to honours. Neither lord Hale, nor lord Coke, nor lord Mansfield, would have

embraced the profession had they not promised themselves more than the bounty of their clients.

These remarks are naturally suggested by the subject of the present biography; who, by superiour industry united to superiour talents, has overcome the obstacles of inferiour station, and raised himself to the highest honours of the state. Something of this, perhaps, may be imputed to fortune; but what is peculiarly his own, is, that he has accomplished this elevation without having become the instrument of a court or minister; that he has *forced his way* by his own talents and owes nothing to the minister of the day, but that he had discrimination enough to discover his own worth, and publick spirit enough to call it into exercise.

John Scott, now LORD ELDON, was born in the town of New Castle-upon-Tyne, about the year 1774. His father, Mr. William Scott was a coal or rather corn-merchant in the same place; but who having a narrow capital, could seldom trade on his own bottom. His chief business therefore consisted in the freight of corn or coals to the metropolis. According to the best accounts he did not succeed, and was never above a very slender mediocrity. His reputation, however, was untainted—he was superiour to his business; and fortune, or rather providence seems to have indemnified him for his own obscurity by the honour of his sons. From the narrow profits of his business he contrived to give his children that education which has been the basis of their greatness. His two sons, John and William, were accordingly sent to a classical school, and as they boarded at home, the expenses were rendered more moderate. There are yet living many respectable tradesmen in New Castle, who remember to have seen the present lord Chancellor, and judge of the admiralty, "with satchel on their backs, and fresh morning face," proceeding from their father's house to the free grammer school.

The progress of the children rewarded the care of their parents. John Scott early distinguished himself for solidity of judgment, and an understanding, which, in proportion to

its slowness, was deep and comprehensive. He is said, therefore, to have learned slowly, but to have learned thoroughly. His attention was always at his command, and once fixed upon an object was irremoveable until he had examined it in all its parts. This is, in fact, the present character of the Lord Chancellor. He is considered at the bar, as he formerly was at school, as possessing a mind more solid than quick; very slow in determining, but always right. We believe that he has never had a judgment reversed. The late preceding chancellor, lord Erskine, was accustomed to say that the house would only lose its time by listening to appeals from the judgment of his predecessor—that they had only one character—they were brought only to gain time, and to run the life of one party against the other.

It was the decided opinion of earl Mansfield, and an opinion recommended by his own peculiar excellence, that no eminence could be expected in the study of the law unless previously laid in classical learning. "It is not sufficient" said his lordship "that the student of the law should understand the *dog-latin* which is used in his profession; this is a jargon, indeed, which has its use, inasmuch as, by long habit it has been brought to convey a precise meaning. The student, if he really aim at excellence, must form his taste and his understanding by the ancient models; it is in these only that he can learn to unite eloquence and reasoning—the utmost powers of the understanding with the discreet use of the imagination. The elements of the law, moreover," says the same authority "are hidden behind a Latin veil, and the most excellent learning must be lost to him who has not skill enough to raise it at his pleasure. Let the law student, therefore, possess himself of this key to ancient treasures."

The father of lord Eldon entertained the same opinion; and though himself a man of narrow learning, spared no efforts to cultivate the understanding of his children. William Scott had a quickness of parts much superiour to his brother, but their father, a man of much natural penetration, was not deceived by this external blazonry; and, if report

may be credited, always predicted that John would be the more eminent. "The county," said he "cannot produce such a boy as John; under that heavy stupid eye and that watery head, he possesses a mind of which the world will hereafter know the worth."

After some years passed by them at the grammar school, in which John Scott obtained most learning, and his brother William, most reputation, their father sent them to the metropolis to be duly entered in the temple.

The name of John Scott appears in the books in the year 1765, but his brother was not entered until the following year.

The two brothers continued to study together in the temple as at school. They lived in the same chambers, and had the same books. Sir William Scott has been heard repeatedly to acknowledge his obligations to the more penetrating judgment of his brother. One thing, indeed, Sir William appears to have learned almost solely from Lord Eldon: we need not say that we here speak of the habit of application. Lord Eldon, during the six or seven years which he employed at the temple, consumed at least six hours daily in the acquisition of professional knowledge. His lordship has subsequently reaped the full advantage of this early application. He now possesses the reputation of being the most profound lawyer on the bench.

It may be thought, perhaps, that the proverbial slowness of his decisions contradicts this assertion. But the point of fact is, that this tardiness is the very effect of the variety of his knowledge. His memory is so stored with cases, that he is perplexed by the multitude of seemingly contrary precedents. He has so many rules before him that he scarcely knows which to apply. He has to seek distinctions in cases exactly similar. If one case alone arose in his *memory*,* he

[* In the zeal of panegyric, the biographer has here mentioned a quality which is highly advantageous to an advocate, and also, though in a less degree, to the judge. It is not his *learning* or *memory*, but his want of judgment, that faculty which compares

would have no difficulty to decide in the moment. His decisions would be more absolute—if his *learning* was more narrow.

In the year 1777, Mr. John Scott was duly called to the bar. He made his appearance in court with more reputation amongst his immediate friends than amongst the bar in general. He was considered by some as an object even of ridicule, for his very attempt to succeed; others, who knew him more intimately, boldly *avowed* his excellence, and predicted that a few years would place him at the head of his profession. Amongst these was Mr. Thurlow, at that time attorney general. He had studied under the greatest pecuniary difficulties. He had supported himself, in common with Burke, by writing for Dodsley. Thurlow, therefore, had a sympathy for Mr. Scott. During an intercourse, at first merely casual, he discovered the talents and acquired knowledge of lord Eldon. This was sufficient for Thurlow, who, in the consciousness of talents, venerated them in others. He immediately cultivated the acquaintance of Mr. Scott; and, by his direct encouragement was the means of introducing him to the world.

Mr. Scott was for a considerable time kept back by his own fault. "Two things" said lord Thurlow "are necessary to a counsel; confidence to push himself on the stage, and learning enough to justify him when he is there." Mr. Scott had a timidity of nature—an aukwardness of address, which kept him in the back ground.

Several years after he was called to the bar, nothing would induce Mr. Scott to push himself into notice; on the other hand, he very patiently suffered himself to be pushed aside.

and discriminates, which embarrasses the Lord Chancellor according to this writer. It would be well if such writers would content themselves with giving *the point of fact*, without attempting to analyze the mind. They are not competent to the task and their presumption generally produces some such bungling as is here exhibited. He seems moreover not to know the difference between learning and memory, or, rather, to think them synonimous terms.]

The remonstrance of his immediate friends, and the encouragement of Thurlow, were equally ineffectual. Under the influence of this natural diffidence, he almost wholly withdrew himself from the courts, and employed himself as a conveyancer or draftsman; a part of the law, which, from its connexion with ancient tenures, has been deservedly the favourite branch of the most eminent lawyers. Mr. Scott advanced his fortune more than his reputation by this practice. He doubtless proved himself the best conveyancer of the day; but this did not satisfy those who knew him likewise to be the best lawyer. They accordingly remonstrated with him, that having so much in his power, he contented himself with so little.

About this time commenced the well known professional jealousy between Mr. Alexander Wedderburne and Mr. Thurlow. Thurlow possessed the more manly mind; Mr. Wedderburne had the talent of application, and the power of retention. Wedderburne was slow, but patient, industrious, examining in detail what he could not comprehend as a system. He overcame every difficulty by his assiduity. His comparative slowness of parts was more than compensated by his superiour industry. Thurlow could have learned more in an hour than Wedderburne in a day, but Thurlow could not be brought to apply himself for the hour, while Wedderburne had no difficulty to study for the day. Wedderburne, therefore, with very inferiour talents, had advanced so rapidly on Thurlow, that it became a doubt amongst the profession which was the best [better] lawyer.

Mr. Thurlow had now an object to accomplish, and he fixed upon Mr. Scott for his means and instrument. He was resolved to bring him forward as a rival to Mr. Wedderburne. Mr. Thurlow had á vanity beneath his acknowledged talents. It was as if he had said, I will bring forward a scholar who shall excel Wedderburne.

Mr. Scott, under his patronage, was soon pushed upon the stage in his own despite. Mr. Thurlow soon afterwards became chancellor, and continued his patronage to Mr. Scott.

Mr. Thurlow is reported to have offered his friend one of the masterships of the court at that time vacant, and which Mr. Scott is said to have declined. It is impossible to conjecture any probable cause for the refusal. It is stated, indeed, that something of delicacy occurred to prevent Mr. Scott from accepting this favour from his patron. It had been previously, we believe, promised to another. Mr. Scott became in a short time well known and much respected as a sound lawyer. Such a reputation is necessarily accompanied by an increasing practice; and Mr. Scott was so fortunate, that in the short space of three years, he is said to have amassed many thousand pounds. His clients were liberal in proportion to the merit of their advocate.

In the year 1783, Mr. Scott obtained a patent of precedency, entitling him to the honours of king's council. In the same year his practice was considered as increasing so fast that he was thought to be in the road of becoming one of the richest men at the bar. His professional success was accompanied by so much prudence and economy, that his expenditure bore no proportion to his income.

In the following year, 1784, the Fox ministry brought in the celebrated India bill, the result of which was, that the king resolved to rid himself of an administration which he suspected to be about to render itself independent of his authority. A difficulty here occurred. No one was willing to encounter the opposition of such a powerful administration. In this state of things, Mr. Pitt became known to his majesty; and as the confidence of this young man was at that period equal to his abilities, he was persuaded to undertake the vacant office.

Lord Thurlow consented to retain the seals; and, in the bustle of party changes, cast his eyes upon Mr. Scott. It was not, however, politically convenient to bring him in either as solicitor or attorney-general; so that his lordship was contented that he should be brought into parliament. Accordingly, in the new parliament, he was elected for the borough of Weobly, in Herefordshire. It was fully understood,

however, that he accepted his seat, conditioning that he should be permitted to vote independently.

The business of the first parliament of the administration of Mr. Pitt was such as required the most powerful talents. It has even been understood that the minister was, during this time, almost solely governed by lord Thurlow; who, upon his own part, is said frequently to have consulted Mr. Scott, and to have derived much assistance from his solid judgment. Mr. Pitt's India bill is understood to have been framed between lord Thurlow and Mr. Scott. Mr. Fox's bill was the most able measure; but Mr. Pitt had entered into office upon the avowed principle, and even positive engagement, of decided opposition to this measure. Mr. Pitt therefore, was compelled to produce something in its stead. He borrowed much of the matter and direct stipulations of Mr. Fox's bill; but, in order that the measure might appear his own, he sometimes departed widely from his original. The consequence was, as might have been expected. It was an expedient of the day.

Lord Eldon is supposed to have had a considerable share in the bill for prohibiting the commercial intercourse of the West India colonies with the United States of America.

The West Indies depend so wholly upon America for their supply of timber and fuel, that the importation of the produce of the colonies had often actually been prevented by the interruption of this supply. The necessary operations of preparing sugar, cotton, &c. require a large stock of wood; and even the largest of the West India islands, Jamaica, is not equal to a tenth part of its own supply.

It was unfortunately represented to the English minister, that the Americans derived considerable profit from this trade; a profit to which their revolt, and subsequent independence had not entitled them. It was added, that the British trader lost in proportion as the American trader gained; that if the woods of Canada, New Brunswick, and Nova Scotia, were fully equal to the supply of the colonies; and that the American trade were prohibited, the English plantations

must necessarily succeed to the supply. Resentment was listened to before prudence; and to avenge ourselves on the Americans, a prohibitory bill almost ruined the colonies.

If this bill had been imputed to Mr. Scott, it is necessary to acknowledge, that the repeal of it is attributed to the same advice. It is, indeed, a part of the character of lord Eldon, that, however, slow in determining, he is never obstinate in his decision—that his mind is open to argument, even after he has declared his opinion—that when convinced of his error, he never hesitates at the acknowledgment—and that he is as anxious to repair the effects of a mistake as others are to conceal it.

When, therefore, the unhappy effects of the American prohibitory bill were made known; when it was found that it had been productive of the most bitter and general distress, Mr. Scott was the first to propose in Parliament, that the obnoxious bill should be repealed. He was here, we believe, in opposition to lord Thurlow, whose firmness too frequently bordered upon obstinacy.

The house, together with the minister were of a different opinion; and concurred with Mr. Scott, that the mischief had been caused by the bill, and that the continuance of it would seal the ruin of the West India colonies. So much attention, however, was given to the pertinacious opposition of Lord Thurlow, that though the bill was repealed, another was substituted in its place, comprehending too many of the obnoxious restrictions. If this subject is again called before the house, we have no doubt that lord Eldon will not disavow, as chancellor, the principles which he so ably supported as Mr. Scott.

The next important business in which Mr. Scott appeared with some eminence, and in which he is supposed to have assisted the minister, was the important subject of the "Irish commercial regulations." This unpleasant discussion, for such it eventually appeared, occupied the attention of the house during two succeeding sessions.

The principles of these resolutions is entitled to the praise of comprehensiveness. It will be found, as may be collected from the resolutions, to be substantially as follows: That Ireland was entitled to a full participation of all the advantages of Great Britain; that, as a sister kingdom, she had a most undoubted right to be put on a fair, equal and impartial footing with Great Britain, in point of commerce; and this, both with respect to foreign countries, and our own colonies: that, in the mutual intercourse between each other, the equality should extend to manufactures, to importation and to exportation: and that, in return for these concessions, Ireland should contribute her full share towards the protection and security of the general commerce.

Throughout the whole discussion of the several resolutions, founded upon the above principle, Mr. Scott distinguished himself by many able speeches; the minister accordingly was considered as regarding him with peculiar favour, and his fortune was already deemed in a fair way of being established.

The Irish resolutions have been much misrepresented in the course of the contests of the two countries. It is impossible, however, that we can deny their being founded upon a principle of equal indulgence and extent, and that the English minister thereby merited, in no slight degree, the gratitude of the Irish nation. Mr. Scott should here come in for his share of praise. But, from some unaccountable cause, the Irish have ever considered the proposed concessions in a very different point of view; and Mr. Scott is accordingly regarded by them as no friend to Ireland. The time, however, may arrive, when that nation may think of him with more justice. Faction is often powerful enough to stifle truth, but, fortunately for the interests of mankind, never wholly to extinguish it.

In the following session, Mr. Scott again presented himself to the attention of parliament, upon the subject of the commercial treaty with France. This treaty, though favourable to England, and not injurious to Portugal, with

some of whose political regulations it interfered, excited alarm in the country gentlemen—an alarm at which, considering the subject at this distance of time, it is impossible to suppress surprise that this nation, so characteristick for its common sense, should have been so egregiously misled.

The opposition, however, availed themselves of the popular prejudices to harass the minister, and the debates were warm, long and personal. Mr. Scott vindicated the treaty with his accustomed solidity of reasoning; and (what in a season of such party heats is much to his credit) the personal attacks of his opponents could never either divert him from his argument or provoke him to personalities. He kept his argument and his temper, in despite of assaults on both.

Parliament and the kingdom were now attracted solely to one point, the impeachment of Warren Hastings. Mr. Scott possessed powers too active not to take a part in this important affair. He spoke on every point, which, in the course of this tedious trial, fell under the cognizance of parliament. It is well known that the most interesting part of the impeachment was the daily contests between the courts of law on the one hand and those of the parliament on the other. The advocates on both sides were the most able men of any time or nation.

Mr. Scott greatly distinguished himself in these discussions. From prejudices natural to a professional man, he was considered as more peculiarly favouring the claims of the courts. It must be confessed, however, that the parliament seemed too much disposed to extend its jurisdiction, and to exempt itself from rules, to which, even as a Supreme Court, it should in natural reason have been subjected. The rules of evidence, and the limitations between what is evidence and what is not, are founded on natural equity; and there is, therefore, no sound reason why, any even Supreme, Court of judicature should adjudge itself above them.

The next business in which Mr. Scott took an eminent part—a part which immediately led to his future elevation—

was the regency. Throughout the whole of this affair the minister is said to have been advised almost exclusively by lord Thurlow and Mr. Scott. It becomes necessary, therefore, to enter some detail upon a subject with which our future historians must connect the name of Scott.

On the 10th December, 1793, the report of the physicians, touching the state of his Majesty's health, was presented to the House of Commons. Mr. Pitt, by the advice of Mr. Scott (now solicitor general) immediately proposed that a committee should be appointed to examine and report all the precedents of the proceedings of former parliaments under circumstances of the interruption or suspension of the royal authority, whether by infancy, sickness or other infirmity.

This committee was accordingly appointed; and the attorney and solicitor general, together with the master of the rolls, were instructed to prepare the required report. Mr. Scott's learning and industry were here peculiarly conspicuous.

On the 12th, the report, which had been prepared, in fact before it was proposed, was proposed to the house. The precedents were chiefly three. The first was taken from the reign of Edward the Third. The parliaments of those days, whether wisely or not, had provided a council about the king's person to act for him. The next precedent was in the reign of Richard the second, when councillors were also appointed to exercise the regal power. The third precedent occurred in the reign of Henry the sixth, during the infancy of that prince. Parliament was then called together by the king's second uncle, the first being still living, but out of the kingdom—and that act was ratified by parliament, this grand council of the nation not deeming it sufficient that it was done by the authority of the duke.

It was contended by Mr. Pitt, Mr. Scott, and the attorney general, that in all these several precedents, the right of supplying the interruption of the royal authority was clearly in the parliament: that the parliament had been invariably consulted, in order to determine what was to be done—that

in the course of their consultations they certainly considered with due respect, the right of the heir apparent—but that the right of the heir apparent required this confirmation of parliament—that parliament, therefore, having a right to reject, confirm, or prefer, had a most undoubted right to modify its trust and obligation.

Upon these principles, Mr. Scott, as solicitor general, was ordered to prepare the act of regency. This act, which was drawn with much ability, empowered his Royal Highness the Prince of Wales, to exercise the royal authority in the name and on the behalf of his majesty, during his majesty's illness, and to do all acts which might be legally done by his majesty. The limitations were, that the care of his majesty's person, and the management of his household, and the direction and appointment of the officers therein, should be in the queen—that the power to be exercised by the prince should not extend to the granting of the real and personal property—to the granting of any office in reversion, or to the granting, for any other term than during his majesty's pleasure, of any pension, or any office whatever, except such as must by law be granted for life; nor to the granting of any rank or dignity of the peerage of this realm to any person, except his majesty's issue who have attained the age of twenty one.

This act was rendered unnecessary by the unexpected recovery of his majesty. The conduct of Mr. Scott, however, during this affair, was no less able than honourable. He afterwards augmented his reputation by his support of the established church, against Mr. Fox's repeated motions for the repeal of the test act.

For these, and other services, Mr. Scott was made attorney general and knighted in the year 1793. The king received him upon his introduction with the most distinguished favour—his majesty seems, indeed, never to have forgotten the staunch friends who adhered to him during that melancholy crisis. Sir John Scott was considered as having become a member of that party, which, from the commence-

ment of the present reign till this time, has retained its original name of the "king's friends."

As attorney general, sir John Scott is regarded as having distinguished himself too much in favour of the prerogative, when it fell to his lot to have the conduct of the prosecutions which the government deemed it necessary to institute against the seditious leaders of the English convention. The times were full of peril and difficulty. A plan was formed to destroy the constitution and the government. That infamous body of men known by the name of the London Corresponding Society, was formed upon the direct plan of the French clubs. The plan was to unite, in the first place, small bodies of men; as soon as they reached a greater number, to divide them into smaller parties; and in this manner (as appeared by their letters and other documents) to spread themselves from town to town, from village to village, and from hamlet to hamlet, till, as they explained it, there should not be an unenlightened man in the whole country.

The proclamation, by which they announced their object, was as singular for its boldness as for atrocity—they candidly avowed their purpose of purifying, as they called it, the representation of the country—openly accused the House of Commons of exercising an usurped authority, and professed their determined resolution to adhere together, and to unite themselves into one firm and permanent body, for the purpose of obtaining an adequate remedy for this intolerable grievance, by corresponding and co-operating with other societies united for the same objects.

Sir John Scott's speech, as attorney-general, was deservedly reputed, as no inconsiderable specimen of his learning and eloquence—some parts of it were peculiarly animated. In describing the Corresponding Society he used the following words:

"You will find them organized, prepared for emergencies and exigencies, relying upon their own strength, and determined to act in combination—in some instances acting with a secrecy calculated to elude observation—in others, pro-

ceeding directly by contrary means to the accomplishment of the same end—representing their numbers as greater than they were, and, therefore, encreasing their number by the very operation of the influence of the appearance of strength. You will find them inflaming the ignorant, under the pretence of enlightening them—debauching their principles towards their country under the pretence of infusing political knowledge in them—addressing themselves principally to those whose rights, whose interests are, in the eye of the law and constitution of England, as valuable as those of any men, but whose education does not enable them immediately to distinguish between political truth and the misrepresentations held out to them—working upon the passions of men, whom Providence hath placed in the lower, but useful and highly respectable situations of life, to irritate them against all that its bounty has blest by assigning to them situations of rank and property; representing them as their oppressors, as their enemies, as their plunderers, as those whom they should not suffer to exist—and (in order at the same time to shut out the possibility of correcting original errour, or rectifying the opinions of those, whom they had so inflamed, misinformed, debauched and misled) not admitting them into these affiliated societies till they had subscribed tests, the principles of which they were not to examine, after they had been admitted."

From some cause or other, to the general surprise of the country, as well as to the disappointment of Government, the several accused persons were acquitted. It seems, indeed, to be the general persuasion, that the ministers had been ill advised when they brought them to trial on an indictment of *treason*. Had they been tried for *sedition*, there cannot be a doubt but that they would all have been convicted; as the papers produced in evidence clearly made out a most atrocious case. The jury, on the other hand, considered it their duty to acquit them of treason.

Sir John Scott continued attorney-general till the administration of Mr. Addington, when he became lord chancellor.

We have before had occasion to mention, that he is regarded as being too tardy in his decisions. This, certainly, is an evil of the first magnitude in a court which is itself but too slow in its process. It must be acknowledged, however, on the other hand, that this tardiness of his lordship is owing to his anxious eagerness for justice. He is unwilling to decide whilst there can be a possiblity of doubt. The tardiness of the decision, therefore, is in some degree compensated by the rare occurrence of any appeal from the judgment when once delivered.

Lord Eldon remained chancellor till the death of Mr. Pitt, when he resigned the seals and was succeeded by lord Erskine.

The discussion of the Catholic question having removed lord Erskine, in common with the coalition administration, lord Eldon was again invited to take the seals; and, we believe, was only induced to accept them, by the particular request of his majesty. Lord Eldon is now considered at the head of his majesty's councils.

The following is no unpleasing specimen of the general style of lord Eldon's eloquence. It is a part of his lordship's speech, on the trial of *Hardy* for treason.

"Gentlemen, it is the great province of a British jury, and God forbid these prisoners should not have the benefit of the reflection, that British juries are able to protect us all; are able to sift the characters of witnesses—to determine what credit is due to them—listening to men of good character without any impression against their evidence—listening to men such as I have stated, with a strong impression against their evidence; that impression, however, to be beat down by the concurrent unsuspicious testimony arising out of the rest of the case, if, upon the whole, you should find the case to be made out as I have stated to you.

"Gentlemen, I forgot to mention to you, that you will likewise find, about the time that this convention was talked of, that there was a new constitution framed for the corresponding society, in which they speak of a royalist as an ene-

my to the liberties of his country—of a democrat as a friend to the liberties of his country; and you will find, that, in a constitution again revised, the whole was thrown into a scheme, and into a system, which was to add physical strength to the purposes of that convention, which was, I submit to you, to assume all civil and political authority.

"If you find all these things, and, if, under the direction of that wisdom that presides here, with respect to which, gentlemen, let me say again, that the situation of this country is indeed reduced to a most miserable one, if the respect, which is due to the administration of the law is suffered to be weakened in any manner, if the respect which is due to the administration of the law, that administration, which, perhaps, is the best feature of the constitution, under which we live, is destroyed, miserable indeed must be the situation of your country! If you find under that direction that the case, being proved in fact, is also made out in law, you will do that on behalf of the publick, which is due to your places, to the publick and to your posterity and theirs.

"But on the other hand, if, after hearing this case fully stated, and attempted to be fully proved, you should be of opinion that it is not proved, or you should be finally of opinion that the offence is not made out according to the *hallowed* interpretation of the statute of Edward III. I say then, in the conclusion, I join from my heart, in the prayer, which the law makes on behalf of the prisoner, God send the prisoner a safe deliverance!"

Lord Eldon, it will not be contested, is signally qualified to preside, as he now does, in the Court of Equity. His legal information is extensive and profound, his attention to cases is vigilant and unwearied, and his attachment to justice is as inflexible as his penetration in the discovery of truth is admirable. This is his praise. He is an honour to the laws which it is his important business to administer.

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intercourse, may affect not only the individuals immediately interested, but the community at large, by stopping the means of procuring necessary supplies of such articles, through this channel. Mr. Gillbanks therefore requests your advice and opinion, as well respecting the present seizure, as to what may be done to obviate the evil in future.

Is this vessel and cargo liable to seizure and confiscation, for the breach of any laws or Orders in Council? And if strictly liable to seizure, are there any circumstances or means, by application to the governor or otherwise, to obtain the release of this vessel and cargo? And should she not be liable to seizure, what redress have Wilkinson and Gillbanks, or Joel West and Co. for such seizure? If this seizure is legal, are there any, and what steps can be adopted, to obtain legal permission for the importation into this island, of American produce in Spanish vessels; or such licence as would protect them from seisure whilst so employed?

Your advice generally, on this subject, is required.

ANSWER.

I had some doubts whether this vessel and cargo came under any of the Orders in Council? But upon consideration, those doubts are in a great measure removed. The case is certainly hard, and arises entirely out of the peculiar situation of the commercial relations of the United States.

The question is, whether a Spanish vessel may import a legal cargo belonging to American merchants into a British port in the West Indies.

I am inclined to think, that such a trade is protected by the 2d, 3d, and 4th sections of the Order in Council of the 4th of July, 1808. The 3d section gives all Spanish vessels free admission into British ports, as before the war. The 4th declares, that all Spanish vessels *shall be suffered to carry on any trade, now considered by his Majesty to be lawfully carried on by neutral ships.*

There can be no doubt that this cargo might have been lawfully imported in an American vessel, both under the

Order of Council of the 11th of April, 1808, (which is not repeated by the late order of the 24th of May, 1809) and the existing proclamation. The 4th section, which I have quoted, gives the same privilege to Spanish vessels and neutrals; in both cases, the British almost equally sacrifice the monopoly and carriage of provisions, and it was compelled to do so, in order to induce the Americans to continue the supply, notwithstanding the embargo and non-intercourse laws. It was obvious that this supply could scarcely be carried on in American bottoms, but it might in Spanish vessels, therefore this privilege was confined to the latter—still, however, a doubt remains whether the present Court will consider itself bound by these Orders in Council, which are certainly in violation of the navigation acts, and the validity of which has been questioned more than once by the present Judge.

I recollect a case in which British goods had been imported from this island in an American vessel to Cuba—she was detained and libelled. I considered that both were protected by the Order of Council, of the 11th of November, 1807, which declares that all British manufactures should be restored, on whatever voyage bound, and to whomsoever the property belonged. The Judge took two days to consider the question—and after much hesitation came to this resolution, that his Majesty in council could neither alter nor modify an act of Parliament. The vessel and cargo were condemned. The imperative obligation of these orders is not questioned in the prize court—but that court is especially constituted by his majesty, and in some measure under his controul and will only. If the court decided on the Orders to which I have referred, both vessel and cargo will be acquitted. If, on the navigation act, their fate is inevitable: it is too late now to make any application to the Governor.

(Signed) A. WHYTE.